82-1221



No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

JEAN S. HARRIS,

*Petitioner,*

—*vs.*—

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

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January 1983

## Questions Presented

1. Where an "in-custody" murder suspect asks to speak to her counsel on the telephone, does the introduction of an inculpatory statement, made on the telephone to counsel and "inadvertently overheard" by a police officer violate the suspect's Fifth Amendment right not to incriminate herself and her Sixth Amendment right to counsel?

2. Whether the failure to close pretrial hearings which serve to revive and augment prior massive publicity about a notorious murder case, violates the petitioner's right to a fair trial under the Sixth Amendment absent proof of actual prejudice?

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

Petitioner, JEAN S. HARRIS, prays that a writ of certiorari issue to review the judgment of the New York Court of Appeals rendered in the above entitled proceeding on November 16, 1982.

### Opinions Below

The trial of the petitioner took place in the County Court of Westchester County, New York before a jury. The opinion rendered by the trial judge denying petitioner's motion to close the pretrial hearings is unreported and is reprinted as Appendix A. at p. A-1, *infra*. The Appellate Division, Second Department affirmed the judgment of conviction in an opinion reported at *People* v. *Harris*, 84 A.D.2d 63, 445 N.Y.S.2d 520 (2d Dept. 1981). It is reprinted as Appendix B at p. A-4, *infra*. The Court of Appeals of New York affirmed the judgment of the Appellate Division in an opinion reported at *People* v. *Harris*, 67 N.Y.2d 335, N.Y.S.2d (1982). It is reprinted as Appendix C at p. A-30, *infra*.

## Jurisdiction

On February 24, 1981 a Westchester County jury, after deliberating for eight days, found Jean Harris guilty of murder in the second degree and two counts of criminal possession of a weapon. On March 20, 1981 Jean Harris was sentenced to 15 years to life at the Bedford Hills Correctional Facility in upstate New York.

On December 30, 1981 the Appellate Division, Second Department affirmed Jean Harris' conviction in an opinion reported at *People* v. *Harris*, 84 A.D.2d 63, 445 N.Y.S.2d 520 (2d Dept. 1981).

On November 16, 1982 the judgment of the Appellate Division was affirmed by the New York Court of Appeals in an opinion reported at *People* v. *Harris*, 57 N.Y.2d 335, N.Y.S.2d (1982).

Under Rule 20.1, this Petition was due January 15, 1983. However, it was filed five days late because the undersigned counsel inadvertently omitted to secure a 30-day extension due to several heavy professional commitments, including preparation for the defense of a major criminal case in Houston, Texas, scheduled to begin this month. Counsel practices alone in a branch office in New York City some distance away from the main office of his firm in Buffalo, New York. The petitioner should not be penalized for counsel's inadvertent oversight. This is particularly true where, as here, there are profound and significant issues arising under the Fifth and Sixth Amendments to the United States Constitution. In addition, the New York Court of Appeals has rendered a decision on those important issues which has obvious precedential impact on the administration of these critical constitutional rights, as illustrated by this Petition.

The Court has the discretion and power to consider such an out-of-time Petition in a case such as this. *Schacht* v. *United States*, 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970), *see also*, R. Stern & E. Gressman, *Supreme Court Practice* 390-395

(5th ed. 1978) and the cases cited therein.* Because of the significance of the unique questions presented by this case, the Court is respectfully requested to entertain the Petition on the merits and waive the requirements of Rule 20.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

## Constitutional Provisions And Statutes Involved

Amendment V provides in pertinent part:

> ". . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

Amendment VI provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Amendment XIV provides in pertinent part:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

## Statement Of The Case

Jean Harris met Dr. Tarnower in 1966 (6768).** Their love affair, which flourished for 14 years, was distinguished by trips abroad, Caribbean vacations and holidays spent in Palm Beach

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* In *Schacht* the Court stressed that "the procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so required." *Shacht v. United States, supra,* at 63-64. In *Fuller v. Alaska,* 393 U.S. 80, 89 S.Ct. 61, 21 L.Ed.2d 212 (1968), the Court granted leave where counsel filed a petition a month after the 90-day time limit expired. In *United States* v. *Mazurie,* 415 U.S. 947, 94 S.Ct. 1468, 39 L.Ed.2d 562 (1974), the Court granted the government's out-of-time petition where it was filed late due to an administrative omission in a large office.

** Page citations refer to the Record on Appeal in the New York Court of Appeals.

(6769-72). She helped him write his Diet Book and stayed with him in Purchase, New York for extended periods of time (6804-05).

However, in 1979 and 1980, a number of personal calamities befell Jean Harris that made her life unbearable (6822-25). Among the more critical were:

1) She believed she had lost the support of the Madeira School Board where she was Headmistress, and knew she would have to look for another job (6882-83);

2) She had to expel four graduating seniors because they were caught using marijuana (6993-97); and

3) Suffering from exhaustion, she had been taking methamphetamines (Speed) and her supply ran out at that critical moment (7000).

These private tragedies drove her into a deep depression and she decided to end her life at the peaceful setting of the residence which for 14 years had become her home away from work. On March 10, 1980 she made out her Will and told her closest friends that life was not worth living any more (5442); left instructions that she was to be cremated (7110); and wrote her secretary directing how her personal belongings were to be distributed.

She drove to Harrison, New York, arriving at the Doctor's home at about 10:30 P.M. (7161). She went to his bedroom, hoping for a few moments of peace before ending her life by the pond outside the house (7114). When another woman's belongings were found in his bathroom, she threw them about and the Doctor slapped her face (7168-70). Stunned by this unexpected action, Jean Harris was about to leave the house when, feeling the weight of the gun in her pocketbook, she attempted to end it all right then and there (7173-74). The Doctor tried to take the gun from her setting in motion a chain of events that ultimately led to his death.

When the police arrived Jean Harris forthrightly told them about her failed suicide and that she knew the Doctor had been

shot in the hand (1931). In her purse a police officer found the written names of people to be notified of her death (1594). She told them she had no intention of returning to Virginia alive (1594).

After Jean Harris was arrested on March 10, 1980, she asked the police if she could call her lawyer after having received her *Miranda* advice (2226-28). A police officer placed the call to her attorney, handed the telephone to Jean Harris and left the room (2229). However, another police officer deliberately remained just outside the room and listened to Jean Harris' conversation (A2271). She was unaware that the policeman was listening to her call. The police officer was permitted to testify at her trial, over defense counsel's strenuous objection, that she said to her lawyer, "Oh, my God, I think I've killed Hy" (A2272).

The principal question presented to the jury for resolution was whether the shooting of Dr. Tarnower was accidental or intentional. Jean Harris' statement to her attorney—"Oh, my God, I think I've killed Hy"—was the only time she used the word "killed" (2272). The prosecutor seized upon this statement and fully exploited it in his summation. On no less than four separate occasions he lashed out at the jury arguing forcefully, at the very end of his summation, that Jean Harris' statement to her lawyer proved conclusively her intent to "kill" the Doctor (9229).*

The Appellate Division, Second Department found this testimony violated Jean Harris' right to counsel, by concluding:

> "In keeping with our State's policy of jealously guarding the right to counsel, we hold that, once that right has attached, no statement which a suspect directs to

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* "Ladies and Gentlemen, if you have any question on the issue of *intent*, not only do you have the statement, 'I did it' but what did she say into the telephone? Without tears, *'Oh, my God, I think I've killed Hy'* then again, *'Oh, my God, I think I've killed Hy'*. Officer Tamilio told you that—*'Oh, my God, I think I've killed Hy'*. This is from the words of a witness who said, when she left the bedroom that night, as far as she knew, the Doctor had a wound to the hand. *'Oh, my God, I think I've killed Hy'* " (9229, emphasis supplied).

> his attorney may be reported at trial by a police officer, regardless of whether he intentionally or inadvertently overheard it" 84 A.D.2d at A-47

The Appellate Division found this constitutional error was harmless. However, the New York Court of Appeals in affirming petitioner's conviction concluded that there was no violation of defendant's right to counsel because "the statement was neither induced, provoked nor encouraged by the actions of the police" and that the eavesdropping was unintentional.* The court also found that the attorney-client privilege was not breached because Jean Harris spoke to her lawyer in the known presence of a police officer and one of Dr. Tarnower's housekeepers.

A number of the country's outstanding medical and forensic experts, through the analysis of physical evidence taken from the scene, confirmed Jean Harris' version of how the Doctor died. Professor Herbert L. MacDonell, the Nation's leading criminologist, fully corroborated Jean Harris' statement about Dr. Tarnower's unintentional death. His testimony was unrebutted.

Despite all the convincing evidence that pointed to Jean Harris' innocence, the jury, after deliberating for eight days, found her guilty of murder in the second degree, and two counts of criminal possession of a weapon.

On December 30, 1981 the Appellate Division, Second Department affirmed Jean Harris' conviction. On November 16, 1982, the New York Court of Appeals affirmed the judgment of the Appellate Division.

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* Petitioner's briefs in both the Appellate Division and the Court of Appeals squarely placed in issue her federal constitutional rights to counsel and an impartial jury (Pp. 18-29; 52-59 Appellant's Brief in Court of Appeals; Pp. 35-40; 85-90 Appellant's Brief in Appellate Division, Second Department).

## Reasons for Granting the Writ

### I

**Where an "in-custody" murder suspect asks to speak to her counsel on the telephone, the introduction of an inculpatory statement, made on the telephone to counsel and "inadvertently overheard" by a police officer violates her Fifth Amendment right not to incriminate herself and her Sixth Amendment right to counsel.**

The critical issue presented by this case, which is of first impression, involves the disclosure by the prosecution of a statement made by the petitioner during a telephone conversation with her attorney which was found by the New York Court of Appeals to have been "inadvertently overheard" by a police officer who was standing nearby when the call was made. There has never been a ruling by this Court on the question of whether the introduction into evidence of the overheard conversations with counsel violates a suspect's Fifth Amendment right not to incriminate herself and her Sixth Amendment right to counsel.

The Court of Appeals ruling sustaining the use of this kind of incriminatory evidence clearly undermines the whole policy of *Miranda*. To be meaningful, the *Miranda* doctrine must allow the suspect to talk to counsel with utmost candor and confidentiality. And the accused, once she has exercised her right to speak to counsel, has a constitutionally protected expectation of privacy in such conversations. To permit the disclosure of overheard conversations with counsel will encourage police officers, throughout the nation, not to take any precautions against overhearing the private conversations between a client and her lawyer.

There are actually two independent constitutional values that are jeopardized by eavesdropping on the private communications between suspects and their lawyers. The first implicates the integrity of the right to counsel entwined with the privilege against self incrimination. The second, and one of equal concern, involves the State's intrusion into the confidential lawyer-client communications which threatens a suspect's right to the

effective assistance of counsel. This Court has held, in an unbroken series of cases extending over a long stretch of its history, that the right to counsel encompasses the right of easy access to a lawyer. *Geders* v. *United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976); *Reynolds* v. *Cochran*, 365 U.S. 525, 81 S.Ct. 723, 5 L.Ed.2d 754 (1961); *Hawk* v. *Olson*, 326 U.S. 271, 66 S.Ct. 116, 90 L.Ed. 61 (1945); *Avery* v. *Alabama*, 301 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940); *Powell* v. *Alabama*, 287 U.S. 45, 53 S.Ct. 55, 70 L.Ed. 158 (1932).

Obviously, if a suspect knows that damaging information she discloses to her attorney in exchange for advice can be used against her, the client will be most reluctant to confide in her lawyer and it will be difficult to obtain any informed legal advice. For this reason it has long been recognized that "the essence of the Sixth Amendment right is . . . privacy of communication with counsel" *United States* v. *Rosner*, 485 F.2d 1213, 1224 (2d Cir. 1973), *cert. denied*, 417 U.S. 950, 94 S.Ct. 3080, 41 L.Ed.2d 672 (1974). *See also*, *Caldwell* v. *United States*, 92 U.S. App. D.C. 355, 205 F.2d 879 (1953); *Coplon* v. *United States*, 89 U.S. App. D.C. 103, 191 F.2d 749 (1951); *Louie Yung* v. *Coleman*, 5 App. Supp. 702, 703 (Idaho 1934); cf., e.g., *In re Rider*, 50 Cal. App. 791, 195 P. 965 (1920); *Thomas* v. *Mills*, 117 Ohio St. 114, 157 N.E. 488 (1927); *State ex rel Tucker* v. *Davis*, 9 Okl. Cr. 94, 130 P. 962 (1913); *Turner* v. *State*, 91 Tex. Cr. R. 627, 241 S.W. 162 (1922); Annot. 5 A.L.R.3d 1360 (1966). Significantly, this Court has never addressed this very issue.

The only practical way to make certain that defendants will feel free to communicate frankly with their lawyers is to prohibit the State from disclosing these confidential communications. Such a *per se* rule of exclusion is fully supported, if not compelled, by the spirit of this Court's decisions in *Black* v. *United States*, 385 U.S. 26, 87 S.Ct. 190, 17 L.Ed.2d 26 (1966) and *O'Brien* v. *United States*, 386 U.S. 345, 87 S.Ct. 1158, 18 L.Ed.2d 94 (1967) where lawyer-client conversations were intercepted by surveillance devices installed by the government to investigate crimes unrelated to the offenses for which the defendants were convicted.

Under the Sixth Amendment it makes no difference how the police heard the defendant's statement once she was represented by counsel. Jean Harris had every right to assume, once she invoked her right to confer with her attorney, that nothing she said to her lawyer would be used against her. A rule that offers defendants relief only when they can prove a police officer intentionally or deliberately eavesdropped on conversations with their lawyers, is little better than no rule at all. Proving that a police officer deliberately listened in on lawyer-client conversations requires the officer to admit his own wrongdoing—the most difficult of tasks.

Simply stated, once defendant's constitutional right to counsel attached (when she first asked to talk with her lawyer) no statement made to her attorney can be used against her. This significant constitutional right cannot be vitiated by either the police officer's inadvertent or deliberate eavesdropping.

For example, if Jean Harris had been conferring with her attorney in a jail cell and a police officer, whose duty it was to patrol the corridor, inadvertently overheard her conversation with her lawyer, the statements to her counsel clearly could not be used against her.

If the constitutional right to counsel is made to depend upon whether the police officer's access to a suspect's statement made to his attorney was accidental or deliberate, the Sixth Amendment would be seriously depreciated. Such a doctrine would generate a host of difficult factual controversies leading to perennial appellate review. The only meaningful rule which is consistent with the long history of the Sixth Amendment is that, when a person confers with his counsel, nothing he says can be used to incriminate him.

The Court of Appeals' conclusion that Jean Harris somehow forfeited her right to confer privately with her attorney because she spoke in the presence of one or two other persons is plainly wrong. Obviously, in this case, the police officers had control of the Tarnower home and Mrs. Harris, who was in custody. Consequently, Jean Harris had no choice over the place where

she was allowed to call her lawyer. She had no power to tell anyone to leave the room.

Once it became apparent that Jean Harris wanted to speak with her attorney, the police had an affirmative duty to provide her with a private place in which she could consult with her lawyer or, in failing to do so, any statements made to her attorney could not be used to incriminate her.

This case teaches us better than any other that constitutional rights are not self enforcing. Courts, such as this one, must carefully guide their implementation. The realization that the petitioner has been condemned to what amounts to life imprisonment based upon the statement made to her lawyer, which she had every right to believe would not be disclosed to anyone, is reason enough to grant this Petition. However, of much greater importance is the awesome realization that such unwarranted interference with the right to counsel affects the integrity of our whole judicial system. For all these reasons, the Petition for Certiorari should be granted.

## II

**The decision below raises an important and novel problem concerning the impact of massive publicity generated by pretrial hearings on a murder defendant's right to a fair trial.**

This is the first criminal case to reach this Court where a defendant convicted of murder was deprived of a fair trial because the trial judge refused to exclude the press from pretrial hearings in direct defiance of *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979). New York's newly formulated rule, requiring that a defendant in a criminal case prove *actual* prejudice in the wake of a trial atmosphere that has been utterly corrupted by antagonistic press coverage, is at odds with the decisions of this Court interpreting the Sixth Amendment.

Dr. Tarnower died on March 10, 1980. Within 24 hours, before a single piece of evidence was ever presented to a grand jury, reports of his murder blared from television sets and appeared in banner headlines throughout Westchester County and the rest of the country. The media extravaganza that was launched lies beyond the vocabulary of exaggeration. The Jean Harris murder prosecution is, beyond a doubt, one of the most publicized trials in recent American history.* Recognizing that the defense would be seriously imperiled by this adverse publicity, trial counsel immediately took steps to restrict this insidious, "run away" publicity.

### The Closure Motion

Alert to the impending calamity that would surely occur if the suppression hearings were held while the jury was actually being selected, counsel moved, under the authority of the *Gan-*

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* On March 24, 1980, TIME and NEWSWEEK ran feature articles on Jean Harris. On March 31, 1980, NEW YORK Magazine ran a cover story on the Jean Harris case. By May 2, 1980, Leisure Books, Inc. published and distributed to newsstands a paperback book entitled "The Scarsdale Murder".

*nett* case, to exclude the press from pretrial hearings in order to insulate the jury from such prejudicial publicity (A1080). The trial judge denied this application stating quite candidly, "The statements which are the subject matter of the suppression hearings are a matter of public record" (A1080). He went on to say, "To close the doors at this time, under the circumstances, would be similar to 'closing the barn door after the horse is gone' " (A1081). Incredible as it may seem the widely publicized pretrial hearings addressing such sensitive issues as the suppression of bullets found in Mrs. Harris' car and the "confession" claimed to have been made by her were conducted simultaneously with the selection of the jury.

The trial court's decision was catastrophic. The hearings proceeded on certain days of the week while, on alternate days, the jury was being selected. This process continued for several weeks. Potential jurors were walking into the courtroom with newspapers under their arms that carried headlines such as, "HARRIS CONFESSED KILLING: . . .,"; "OFFICER TESTIFIES MRS. HARRIS SAID SHE WAS SLAYER"; "SHE TOLD ME HARRIS SHOT DOCTOR,. . ."; "DIET DOCTOR'S GIRL HOPED TO DIE WITH HER LOVER".* Both the prosecutor and the trial judge later conceded there was no claim of a "confession" (A186). However, by then appellant's "confession" had become a household word. All hope of obtaining an impartial jury was lost. The raw newspaper sensationalism, which sprung from the pretrial hearings, demonstrates the enormity of the prejudice inflicted upon the Harris jurors—the very type of prejudice sought to be outlawed by both the letter and spirit of the *Gannett* case. There was no way a juror's impartiality could survive in the face of the ferocious notoriety

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* *The New York Times*, November 18, 1980 at p. B-25 reported that "Almost every prospective juror in the original pool of 74 called up for examination raised a hand when asked if he or she had read about the case or seen it on television" (November 19, 1980 at p. B-2). On October 10, 1980, during the hearing, the *New York Post* reported a: "Police allegation that 'she had written certain notes indicating that she was going to commit this murder' ". On October 15, 1980, the *New York Post* published the bold headline: "DIET DOCTOR'S GIRL HOPED TO DIE WITH HER LOVER".

created by these pretrial proceedings. Thus, no case ever needed more desperately the protection of the rule in *Gannett*.

## The New York Court of Appeals Decision

The New York Court of Appeals was forced to acknowledge that "substantial publicity surrounded the developments of this case" and recognized that the trial court refused to close the pretrial proceedings because the statements which were the subject of the suppression hearing "had been known to the public for months". The court refused to grant Jean Harris a new trial because the petitioner failed to prove that prejudice "actually resulted from the failure to close the proceeding". New York's rule requiring petitioner to prove actual prejudice in the face of such pervasive publicity that permeated the entire jury, is in conflict with the decisions of this Court interpreting the Sixth Amendment.

It is well settled that a trial judge, to safeguard the due process rights of an accused, has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. *Sheppard* v. *Maxwell*, 384 U.S. 333, 86 S.Ct. 1506, 16 L.Ed.2d 600 (1966); *Irvin* v. *Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *Marshall* v. *United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959). This proscriptive action is required because of the universal recognition that adverse publicity can endanger the ability of a defendant to receive a fair trial. This Court has repeatedly ruled that where *trial* publicity reaches the magnitude evident in the *Harris* case, prejudice is presumed. *Rideau* v. *Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); *Estes* v. *Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), and *Sheppard* v. *Maxwell*, 384 U.S. 333, 86 S.Ct. 1506, 16 L.Ed.2d 600 (1966). In *Rideau*, *Estes* and *Sheppard*, the influence of the news media, either in the community at large or in the courtroom itself, pervaded the proceedings. In reversing the convictions of the defendants in those cases, the Court did not examine the *voir dire* for evidence of actual prejudice because the high level of publicity impelled a presumption of prejudice.

The same atmosphere prevailed in Jean Harris' prosecution. When almost every prospective juror in the original pool of 74 jurors called for service admitted they had been exposed to reports of the case, either in the newspapers or on television, the conclusion is inescapable that the attitude of the entire venire toward Jean Harris was infected with this hostile publicity.

In the wake of *Gannett*, more than 410 cases spread throughout the United States, involving the litigation of closure motions have been catalogued by the Reporters Committee for Freedom of the Press.* Thus, the fragile problem of balancing the interests of a free press against an accused's right to a fair trial continues to create issues of constitutional proportion that are a constant source of controversy in our federal and state courts. Among the problems unresolved by *Gannett*, and aptly illustrated by Jean Harris' case, which must be decided if total chaos in the orderly litigation of these important rights is to be avoided, are:

1) Whether the propriety of granting a closure motion in a pretrial hearing depends in any fashion on the success or failure of the defendant's suppression motion.

2) Whether the decision to exclude the press should depend in any degree upon whether the public has already been exposed to other harmful information.

3) When the publicity generated by the pretrial hearing is pervasive must the defendant show actual prejudice in order to obtain a new trial.

Taking each of these issues one at a time, it seems manifest that the drastic decision to bar the press from pretrial proceedings must be made on much more objective criteria than a premonition of whether or not the motion to suppress will be granted or denied. Once it is determined that there is a reasonable risk that a defendant's right to a fair trial will be prejudiced by the high level of publicity in the community, a closure

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* Reporters Committee for Freedom of The Press, 800 18th Street, N.W., Washington, D.C. 20006.

motion must be granted regardless of whether or not the motion to suppress is successful. This is the only way the rule of *Gannett* can be applied uniformly.

Furthermore, in this case, even though the statements were not suppressed, the bullets found in Jean Harris' car were and that volatile evidence was widely publicized in Westchester County. In addition, a defendant in a criminal trial should enjoy the right of having such dramatic evidence as "Oh, my God, I think I've killed Hy" introduced to jurors in the controlled environment of a courtroom where proper instructions may be given and appropriate cross-examination can blunt the impact of such a declaration. It makes no sense to have the Jury battered with such an inflammatory term as "confession" long before they receive accurate information in the sterile atmosphere of the courtroom.*

Furthermore, in virtually every criminal case there will be disclosure of harmful evidence months before the pretrial proceedings commence. But, surely, the decision concerning whether the press should be excluded in the pretrial proceedings cannot be made to depend upon the fact that there has already been bad publicity. The constitutional impulse for excluding the news media from the pretrial hearings rests on the premise that further harmful publicity should be avoided.

And finally, the only meaningful remedy for a defendant whose closure motion has been erroneously denied is a reversal of the conviction. The rule cannot depend upon a showing of prejudice after the fact. Prejudice is presumed under the rule which requires that a pretrial hearing be closed. Otherwise

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* The American Bar Association's Advisory Committee on Fair Trial and Free Press, after extensive research, found that adverse publicity which occurs during a trial (Jean Harris' had commenced with jury selection) is even more damaging than extensive pretrial publicity. The Committee wrote: "Information reported well in advance of trial may be forgotten; information appearing during the trial seems far more likely to remain in the mind of the trier of fact if he is exposed to it. Further, he may be more inclined to seek out this information when he is personally involved in the case" *Fair Trial and Free Press*, Tentative Draft 1976 at p. 40.

there would be no purpose in banning the press from a court proceeding. Once a court determines that a judge erred in denying a closure motion because of a misconception of the law, the defendant is subjected to the very prejudice sought to be avoided. The adverse effect of exposing the jury panel to this type of publicity immeasurably and irreparably infects the entire trial. In this case, the New York Court of Appeals tacitly acknowledged the potential for prejudice but failed to take corrective action because actual prejudice was not proven. This ruling is in conflict with the cases of this Court acknowledging the presumption of prejudice where cases are tried under similar circumstances.

Thus, it is imperative that this Court identify for the guidance of trial courts the constitutional standards to be employed by judges in granting or denying closure motions. Since this Court last considered whether or not a defendant had been prejudiced by inordinate publicity (*Murphy* v. *Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44L.ED.2d 589 [1975]) the power of the media has escalated enormously.

A fair and objective assessment of guilt or innocence is one of the most cherished policies of our system of justice. To have conducted open pretrial hearings which involved the most inflammatory disclosures in the form of "confessions" and suppressed bullets simultaneously with jury selection inevitably prejudiced the jury panel beyond redemption. Surely in this case the adverse publicity was so pervasive that the apparent prejudice must be presumed.

## Conclusion

For these various reasons, this Petition for a Writ of Certiorari to review the judgment of the New York Court of Appeals should be granted.

January 19, 1983

Respectfully submitted,

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## APPENDICES

## APPENDIX A

COUNTY COURT : STATE OF NEW YORK
COUNTY OF WESTCHESTER
THE PEOPLE OF THE STATE OF NEW YORK
—against—
JEAN HARRIS,
Defendant.

DECISION Filed Oct 8 1980 George R. Morrow County Clerk County of Westchester

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LEGGETT, J.

At this time, on the very eve of trial, at a point in time when suppression hearings are to begin, the defense, by oral motion, moves to exclude the press from attendance at the preliminary hearing level.

This application is opposed by the press who contend that they have a First Amendment right to be present and also by the District Attorney's Office as the representative of the People of the State of New York.

At the outset the Court is cognizant of the conflict between the rights afforded to the public under the First Amendment with the defendant's rights to a fair trial as guaranteed by the Sixth Amendment.

In evaluating which right will yield or whether in fact, under the circumstances, either right will have to yield to the other, is an issue that must be decided in light of the entirety of the pre-trial publicity together with public record in each particular case.

The public and press have a presumptive right to attend all criminal court proceedings. It is the burden of the defense to come forward with sufficient evidence to rebutt or overcome this presumptive right. In other words, the defendant must

show that because of press and public attendance at the pre-trial hearings, the defendant will probably be unable to have a fair trial "because of the *grave* threat that suppressed evidence if publically disclosed prior to trial would virtually eliminate the possibility that the accused would receive a fair trial in a highly publicized case." *Gannett v Leggett*, 48 NY 2d 338.

In this case it is abundantly clear that the statements which are the subject matter of the suppression hearings are a matter of public record by virtue of various notices, motion papers and affidavits filed in court by both sides and are at present, and have been for months, available for publication and public perusal. The press on occasion has quoted defense counsel pertaining to various defenses that were under consideration in this case.

To close the hearings at this time and under these circumstances would be similar to "closing the barn door after the horse is gone."

Aside from the fact that these statements are already before the public, the Court is satisfied that a county the size of Westchester County with a population of approximately 900,000 people who are basically sophisticated and intelligent, there will be no difficulty in finding 12 jurors and 2 or 4 alternates who can be fair and impartial.

Certainly we will be able, through the detailed and careful voir dire of the panel of jurors, to screen out any people who may be so infatuated or enthralled with the stories as they appear in the newspapers that they will be unable to evaluate the evidence with an open and impartial mind. Contrary to the defense's contention, experience teaches me that people in this County are more concerned with their own lives and concerns than to pay more than passing interest to a case of this type. In the case of *People v Verrone*, local press coverage was detailed and in fact notices had been sent out to the parents of many grammar school children throughout the County alerting them to the presence of a rapist preying on children. However, the Court was surprised to learn when voir dire began that less than

20 percent of the jury panel had read or were even aware of the case.

In short, while the litigants themselves are actually aware of everything that appears in the press about their case, they tend to distort the public's perception and recollection of these events in which they have themselves a deep, vital and abiding interest, whereas to the public at large, it is just a passing event in an otherwise hectic society.

In conclusion, under all the circumstances presented here, the First Amendment rights will prevail as the Court finds that Sixth Amendment rights of the defendant will not be jeopardized and consequently the Huntley, Sandoval, Alfinito and Tangible Evidence hearings will be open to the public and press.

This shall constitute the decision and order of the Court.

DATED: White Plains, New York
October 8, 1980

RUSSELL R. LEGGETT
County Court Judge

HON. CARL A. VERGARI
District Attorney
Courthouse
White Plains, New York

JOEL M. ARNOU, ESQ.
Attorney for Defendant
14 Mamaroneck Avenue
White Plains, New York

## APPENDIX B

### APPEARANCES OF COUNSEL

*Joel Martin Aurnou, Victor G. Grossman, Herald Price Fahringer* and *Elaine G. Brown* for appellant (one brief filed).

*Carl A. Vergari, District Attorney (Anthony Joseph Servino, Gerald D. Reilly* and *Richard E. Weill* of counsel), for respondent.

### OPINION OF THE COURT

MOLLEN, P.J.

This appeal arises out of the homicide of Dr. Herman Tarnower, a noted Westchester cardiologist and proponent of the so-called Scarsdale Diet. His convicted slayer, defendant Jean Harris, was the divorced headmistress of the Madeira School in Virginia. She had been Tarnower's companion and paramour for over 13 years.

The prosecution's theory was that Mrs. Harris, desperately unhappy over the loss of Dr. Tarnower's affections and resentful of his relationship with a younger woman, entered his home, unannounced and unexpected, and intentionally shot him three times, causing his death. Mrs. Harris, who never denied having shot Dr. Tarnower, maintained that the shooting was accidental. She insisted that concerns over her troubled relationship with the doctor had played no part in her actions. Instead, she claimed that, consumed with feelings of her own inadequacy and distraught over setbacks in her professional life, she had decided to take her own life on the grounds of the Tarnower estate which she had grown to love and to think of as her home. She claimed that Dr. Tarnower, in his struggle to prevent her from committing suicide, was himself accidentally shot and killed.

Thus, the lines at trial were clearly drawn. The crucial question was whether Dr. Tarnower had been intentionally murdered or, instead, had died as a result of a tragic accident. The jury resolved the question in favor of the prosecution, convicting the defendant of intentional murder and other lesser related crimes.

Mrs. Harris does not contend that the proof at trial was legally insufficient to support a murder conviction or that the jury's verdict was against the weight of the evidence.

Instead, she argues that a variety of errors committed at trial deprived her of a full and fair opportunity to present and support her version of the incident before a properly constituted and impartial jury.

We turn first to a review of the evidence adduced from the more than 90 witnesses who appeared at the defendant's 14-week trial.

A. THE CASE FOR THE PROSECUTION

The prosecution's efforts to reconstruct the events in question rested primarily on the testimony of Suzanne van der Vreken, Dr. Tarnower's housemanager, and on the account of police officers who responded to the scene after the shooting. Mrs. van der Vreken, who had worked for Tarnower for 16 years, lived in the Tarnower home with her husband Henri who was himself employed as the doctor's estate manager. Mrs. van der Vreken's recollection was aided by a book in which she recorded the names of Dr. Tarnower's guests and the dates on which they visited his home.[1] She was thus able to provide a history of Tarnower's relationship with Mrs. Harris and with her rival, divorcée Lyn Tryforos.

Mrs. van der Vreken first met Jean Harris in 1967 at the Tarnower home. Harris soon became a frequent visitor there and often accompanied the doctor on trips abroad. She also vacationed with him on holidays. Whenever Harris spent the night at the Tarnower residence, she slept in his bedroom. According to Mrs. van der Vreken, however, Harris was not Dr. Tarnower's only love interest.

Mrs. van der Vreken testified that, in early 1975, she became aware that the doctor was dating his employee, Lynn Tryforos. As time passed, Tryforos' visits to the Tarnower home became more frequent, and on various occasions she was invited to spend the night. Like Harris, when Tryforos stayed overnight at the house, she slept in Tarnower's bedroom. Although Dr. Tarnower dated other women after 1975, only Harris and Tryforos ever spent the night with him at his home.

1. A gourmet cook, Mrs. van der Vreken had kept those records in order to avoid serving a guest the same meal twice.

With Mrs. van der Vreken's help, Tarnower attempted to keep the two women apart. When Tryforos was expected, he would ask Mrs. van der Vreken to make sure that Harris' clothing and personal belongings were hidden away. When Harris was invited, the same would be done with any item belonging to Tryforos.

As Tryforos' visits became more frequent, Harris' seemed to become less so. According to Mrs. van der Vreken's book, Harris was a guest at the Tarnower home at least 63 times in 1977. In 1978 she spent the night on at least 49 occasions. In 1979 that number was reduced to 26.

Despite Tarnower's apparent efforts to keep the women apart, it was clear that they knew about each other. Indeed, Harris frequently spoke to Mrs. van der Vreken about Tryforos. Moreover, the rivalry was not always conducted on the highest level. In March, 1979, for example, Harris and Tarnower spent a week in the Caribbean. When they returned, Harris discovered that her clothing, kept in a closet on the first floor of Tarnower's home, had been ripped and slashed. Other than the servants, the only person in the house while Tarnower and Harris were on vacation was Lynn Tryforos. Mrs. van der Vreken mentioned the incident to Tarnower, but he took no action.

Tarnower and Harris spent the Christmas and New Year's holidays of 1979 together in Palm Beach, Florida. Thereafter, in early February, 1980, while Tarnower and Tryforos were traveling out of the country together, Mrs. Harris called Mrs. van der Vreken to ask if she would mind arranging a small dinner party for her son David who was getting married. Mrs. van der Vreken replied that she would not mind, provided that Tarnower approved. The request struck Mrs. van der Vreken as unusual since, whenever a party was planned, Tarnower would tell her about it well in advance. He had mentioned nothing of a party for David Harris. Nevertheless, in mid-February, a prewedding party was held for David in the Tarnower residence, and Mrs. van der Vreken described it as a joyous occasion. Mrs. Harris herself was Tarnower's overnight guest on the weekend of the party. She was not to return to Tarnower's home until the night of Monday, March 10, 1980.

On that date, at approximately 5:30 P.M., Harris drove her blue Chrysler to the house of the superintendent of buildings and grounds at the Madeira School. The car was assigned to her as Madeira's headmistress and bore Virginia license plates. Harris asked the superintendent if she could get some gasoline because she was late for a dinner party and was afraid that there would be a long line at the nearby gas station. The superintendent agreed and filled her car with gas. He noticed nothing unusual about Mrs. Harris that day except that she appeared to be in a great hurry.

Meanwhile, at the Tarnower house, Mrs. van der Vreken was preparing a dinner planned for the doctor, his niece Debbie Raizes, and Lynn Tryforos. Tryforos had spent the weekend with Tarnower at his home, and had left with him early that morning. Each had appeared to be in a good mood, and they were making plans for another trip.

In the late afternoon of March 10, 1980, prior to Tarnower's return from work, Mrs. van der Vreken received two telephone calls from Mrs. Harris. During the first call, Harris simply asked if Tarnower was at home and Mrs. van der Vreken replied that he was not. Sounding angry, Harris hung up. When Harris called back, she again asked if Tarnower was at home and, when Mrs. van der Vreken replied that he was not, Harris asked if he would be there for dinner. Mrs. van der Vreken said that he would not. Harris then asked if Tarnower planned to go to New York that evening, saying that she could meet him there. Mrs. van der Vreken said that she did not know. Mrs. van der Vreken testified that, during this second call, Harris sounded worried and, as she hung up, she seemed to be crying.

In answering Harris as she did, Mrs. van der Vreken was following Dr. Tarnower's instructions. Some six or eight months earlier, he had told her that, if he had guests when Mrs. Harris called, Mrs. van der Vreken was to tell her that he was not at home. Apparently Mrs. van der Vreken had also followed these directions when Harris had called on the preceding three days during which Tryforos had been Tarnower's houseguest.

Mrs. van der Vreken testified that, on the evening of March 10, 1980, Tarnower's bedroom was in perfect order. Tryforos' nightgown, robe, slippers and jewelry were still in the guest's bathroom. When Tarnower returned home, he went into the living room and read the papers. He then went upstairs to change for dinner. His guests, Debbie Raizes and Lynn Tryforos, arrived together about 7:00 P.M. Dinner was served by Henri and the meal was completed by approximately 8:00 P.M. After dinner, they all celebrated Mrs. van der Vreken's birthday with a cake that Tryforos had brought for the occasion. The weather was rainy and stormy, and the women left together at approximately 8:45 P.M. Some five minutes later Tarnower went upstairs to bed.

Mrs. van der Vreken testified that, ordinarily, when guests were expected at night, a light would be left on at the top of the outside steps. On the night of March 10, 1980, after the dinner guests had gone and Dr. Tarnower had retired to his bedroom, the lights on the steps were out.

Sometime later, Henri went to sleep. Mrs. van der Vreken, however, decided to paint and to watch television before going to bed. Suddenly, at approximately 10:45 or 11:00 P.M., she heard the buzzer on the kitchen telephone. The buzzer was a device by which Tarnower would generally contact the servants, using the attachment on his own telephone in his bedroom. Mrs. van der Vreken was surprised to hear the buzzer because it was late and Tarnower had never before called for her at that hour. As she walked toward the kitchen, she heard the buzzer a second time. She picked up the telephone and gave her usual salutation, "Doctor?". She repeated the word twice but received no answer. Instead, she heard the sound of yelling and she recognized Mrs. Harris' voice. She next heard some banging and then the sound of a shot. She never spoke to Dr. Tarnower again.

Mrs. van der Vreken ran into her husband's bedroom and told him that she had heard a shot and that Mrs. Harris was in the house. She suggested that they go upstairs because she knew that something was wrong. Henri cautioned that, since she had heard a shot, they had better call the police first. They tried to do so from the

kitchen telephone, but it would not work. Although there were several telephones in the house, there were only two separate lines. The van der Vrekens returned to Henri's room and used their private telephone to make several calls to the police.[2] Henri then ran out of the house to seek help from a neighbor. He saw a car, which he recognized as Mrs. Harris', pulling away. Mrs. van der Vreken saw the same thing from inside the house and noticed that the front door was now open.

Mrs. van der Vreken raced upstairs to Tarnower's bedroom and saw him kneeling between the two single beds in the room. The telephone receiver was near him on the floor. His pajamas were bloody and he had blood on his back. After Mrs. van der Vreken satisfied herself that the doctor was still alive, she ran downstairs to the telephone in her room to try to call for help. When she couldn't get through, she returned to the kitchen and saw Mrs. Harris coming up the steps with a police officer behind her. That officer was Patrolman Brian McKenna. He had been responding to a radio call which directed him to the Tarnower residence to investigate a possible burglary in progress. He received a subsequent transmission warning him of shots fired. On his way to Tarnower's house, he saw Mrs. Harris' car making a U-turn. He followed her back to the Tarnower residence and into the driveway. Mrs. Harris got out of the car and ran to the officer, telling him that the doctor had been shot, and urging him to hurry. McKenna followed Harris into the house and asked who had done the shooting. Mrs. van der Vreken responded that Mrs. Harris had.

McKenna, the two women, and Henri went up the stairs to Tarnower's bedroom. The room was in disarray with items of clothing, curlers and jewelry strewn about. Upon reaching the bedroom, McKenna saw Tarnower crouched on his knees leaning up against the headboard. There was a telephone on the floor immediately next to him, and he had blood all over his body. Checking Tarnower for vital signs and finding none, McKenna raced back to his vehicle, radioed headquarters for an ambulance, and returned to the bedroom with a resuscitator. Tarnower was placed on

2. Police records indicate that the first call was received at 10:57 P.M.

his back and McKenna began administering first aid to him. His efforts proved successful, as Tarnower resumed breathing.

As Tarnower lay on his back Mrs. Harris sat on the edge of one of the beds looking at him. She bent down, touched his face with the tip of her finger, and said, "Oh, Hy, why didn't you kill me?". Meanwhile, other officers were arriving on the scene and someone directed the women to go downstairs.

One of the first officers to respond to the Tarnower home was Detective Arthur Siciliano. When he entered the house, he encountered the two women standing in the foyer. He identified himself as a detective and asked what had happened. Harris said that the doctor had been shot. The detective asked where the doctor was. Harris replied that he was upstairs. The detective asked who did it, and Harris answered that she did. The detective then placed her under arrest and advised her of her constitutional rights. Harris responded that she would waive her rights and tell the detective what happened. The detective asked Harris where the gun was, and she said it was in her car. He accompanied her to the vehicle, and recovered a revolver from the front seat. The detective noticed a bloodstain on Mrs. Harris' blouse and a bruise on her lip. He asked her if she needed medical assistance and she replied that she did not.

The detective then asked Harris for a full account of the events of the evening. She told him that she had driven up from Virginia with the hope of being killed by Dr. Tarnower. She then hesitated a second and said, "He wanted to live, I wanted to die." She hesitated again and said, "I've been through so much hell with him, I loved him very much, he slept with every woman he could, and I had it" She then handed the detective a piece of paper containing a list of names. She said that she had recently prepared the list and that the people named were to be notified in the event that her wishes were carried out. She also stated that she had no intention of returning to Virginia alive.

Describing the events in the bedroom, Harris said that she and Tarnower had had a struggle and that the gun had

gone off several times. She said that she had asked Tarnower to kill her but that the doctor had said, "Get out of here, you're crazy." They started to struggle again, and the gun went off several times. She admitted that the gun was hers and said, "I remember holding the gun and shooting him in the hand." She did not know who had been in control of the weapon, however. Tears came to her eyes and she asked if she could see Dr. Tarnower. The detective replied that he did not think that that would be a good idea.

As Harris and the detective spoke, officers were bringing Dr. Tarnower down the stairs on a stretcher. When Harris saw Tarnower, she fell into the detective's arms and appeared to faint. The detective called for a doctor, but Harris immediately stood up as if nothing had happened and announced that she did not need a doctor. After Tarnower had been removed, Harris turned to Henri and in a loud voice asked him who had been there for dinner that evening. Henri directed his response to the officers. He asked them to remove Mrs. Harris from the premises as quickly as possible.

A few minutes later, Mrs. Harris spoke with Lieutenant Flick who had arrived at the scene. She told him that it was ironic that Dr. Tarnower was dying and that she was alive since it was he who wanted to live and she who wanted to die. Flick attempted to advise her of her constitutional rights, but she protested that she had already been given her rights three times. Flick then asked her if there was anyone she wanted to call, and she asked to call a lawyer friend in New York City. She obtained the number and was permitted to enter the kitchen to try to telephone the attorney. When she returned and said that she could not get through, Lieutenant Flick attempted to use the kitchen telephone to place the call. When he could not get through either, someone suggested that they use the telephone in the servants' quarters which was on a different line. Flick used that telephone to contact an attorney named Leslie Jacobson. He informed Jacobson that Harris had been involved in a shooting. Jacobson asked to speak with Mrs. Harris, and Flick returned to the foyer where Harris was seated with Officer Tamilio. Flick

told Harris that her party was on the line, and Tamilio then assisted her into the bedroom. She was handed the receiver, and Tamilio started backing away to the doorway of the room. Henri, however, remained seated on the bed, only some four or five feet from where Harris now sat.

Tamilio testified that, as he stood at the doorway, he heard Mrs. Harris say into the telephone, "Oh, my God, I think I've killed Hy."

When Harris completed her conversation with the attorney, Flick returned to the bedroom and spoke with him. After the telephone call, Mrs. Harris was escorted out of Henri's room. She passed an open door which led to a bathroom, and she stopped to look inside in the direction of a mirror. Touching her face in the area of her mouth she said as if speaking to herself, "He hit me, he hit me a lot."

Meanwhile, Dr. Tarnower was being rushed by police ambulance to St. Agnes Hospital. Dr. Roth, a police surgeon, rode with him. Sometime during the trip, Dr. Roth lost Dr. Tarnower's vital signs. His attempts to administer emergency aid were unsuccessful. At the hospital, attendants rushed Tarnower to surgery but the physicians were unable to revive him, and he was subsequently pronounced dead.

Mrs. Harris was driven to the Harrison police station where she was charged with assault. Two attorneys soon arrived and were given the opportunity to confer with her in private. Their conference was interrupted when an officer informed them that Tarnower had died and that the charge against Mrs. Harris would now be murder.

Police officers began examining the scene. They discovered bloodstains on the bed and two trails of blood apparently leading from Tarnower's bed to the bathroom and back. They also discovered a bullet hole in the glass door leading to the deck outside the bedroom, and later recovered a bullet fragment from a post on the deck. The clothing scattered around the room was gathered and seized, as was the bloodstained telephone and several cartridges found on the floor. A box of curlers was also lying on the floor, and there was jewelry thrown about. A bullet was discovered lodged in a headboard, and the bathtub in the guest bathroom was chipped.

The next day, Dr. Louis Roh performed an autopsy on Tarnower's body. He found four separate bullet wounds. One was to the right upper anterior chest wall. The bullet had fractured the medial end of the right clavicle and had perforated the right subclavian vein, continuing into the right chest cavity. The bullet did no further damage and was recovered in the chest cavity. The direction of the track was front to back, downward, and slightly right to left. Another wound appeared on the right posterior aspect of the shoulder. The bullet had entered the right chest cavity, fracturing three ribs. The fractures had caused the laceration of the pleural lining. The bullet had traveled in a downward trajectory on the surface of the lung causing a great deal of hemorrhaging in lung tissue. It continued downward, perforating the diaphragm and the front part of the right kidney where it was recovered. The direction of the bullet track was mainly downward, with a slight deviation from back to front and right to left. A third wound appeared on the right side of the right arm. The track extended through the tricep muscle and then into the right humerus. That bone was completely fractured and the bullet was recovered under the skin. A fourth wound was to the right hand with the entrance in the palm at the base of the right thumb. The track extended through the muscle tissue between the thumb and the index finger, exiting through the back of the hand.

It was determined that the cause of Tarnower's death was bullet wounds of the anterior chest wall, posterior aspect of the shoulder, the lung, the kidney, right arm and right hand.

It was later established that the bullets recovered from Tarnower's body and those found at the scene were all fired by the gun found in Mrs. Harris' car. When seized by the police, the weapon had a bent ejector rod and a broken hinge on the cylinder. The cylinder had one empty chamber and five spent cartridges. The weapon itself showed indications of blood.

The gun was a .32 calibre Harrington-Richardson Model 732, which Mrs. Harris had bought at a sports shop in Virginia in October, 1978. She had told the salesman that she was interested in purchasing a handgun for purposes of

self-defense, saying that she needed it because she lived in a rather secluded area. When first shown the gun, she looked at it "as if it were a strange object", leading the salesman to believe that she had no knowledge of handguns. After some indecision, she finally purchased the weapon that would later be used to take Herman Tarnower's life.

B. THE CASE FOR THE DEFENSE

As earlier noted, Mrs. Harris' position at trial was that her actions on the night of March 10, 1980, were not related to any fear of losing Dr. Tarnower's affections. She claimed that she had come to accept his desire and need for other women, and no longer felt threatened by it. Mrs. Harris maintained that she had suffered from an increasing sense of exhaustion and depression brought on by the burden of her duties as headmistress of the Madeira School. It was established that Dr. Tarnower had prescribed a variety of drugs to assist her in overcoming her feelings of exhaustion. Among these was Desoxyn, a methamphetamine which Mrs. Harris took regularly pursuant to Dr. Tarnower's prescription. Mrs. Harris testified that she had run out of the drug several days before the incident in question, and indeed, it was established that a new supply had arrived at the Madeira School on the day after Tarnower was shot.

Moreover, several witnesses testified that Mrs. Harris had demonstrated increased anxiety and depression as March 10 approached. It was established that, in the first week of March, 1980, she had returned from an exhausting fund-raising trip. Upon her return, she was met with the news of the discovery of drug paraphernalia in the dormitory rooms of four senior students who had held positions of trust in the student government. On March 6, Mrs. Harris chaired a meeting to determine what, if any, action should be taken against the offending students. At that meeting, she was subjected to severe criticism by certain segments of the student body. Nevertheless, she concurred in the judgment of the council and ordered the four girls expelled.

Apparently, this was merely one of a number of difficult episodes which had followed the shock of Mrs. Harris' discovery that members of Madeira's board of directors

were unhappy with her performance and that her administration of the school had been severely criticized in a report issued by an independent consultant. According to Mrs. Harris, the final straw came when she received a letter from one of her favorite students criticizing the disciplinary action she had taken against the four girls.

A succession of witnesses from Madeira confirmed that, following the expulsions, Mrs. Harris had been distracted, agitated, and unable to function in her normal manner. Many witnesses expressed great concern over her condition. They all seemed to show great affection and respect for her and, indeed, many were called specifically to attest to her high reputation for integrity, honesty, and peaceableness.

The crucial witness for the defense, however, was Mrs. Harris herself, for she not only described the stresses she felt and her resulting state of mind, but also recounted for the jury her version of how Dr. Tarnower had come to be shot and killed.

Mrs. Harris testified that she had met Dr. Tarnower at a party in December, 1966. They enjoyed each other's company and she soon fell in love with him. They shared many common interests, and traveled extensively together. Mrs. Harris also spent much time at Tarnower's home, which she grew to love as her own. In May, 1967, Tarnower asked her to marry him and gave her a large engagement ring. Sometime later, however, he reneged, telling her that he was married to his profession. She understood and did not believe marriage to be essential. The only thing that mattered to her was being with him.

As early as 1970, Mrs. Harris became aware that Tarnower was seeing other women. At one point, he actually told her that he was going to marry someone else, but she never seriously believed it. Thereafter, they continued their relationship, traveling around the world together and seeing each other almost every weekend from 1971 to 1975. Her only health related complaint during this time was her fear of running out of energy and she took medicine prescribed by Dr. Tarnower to prevent fatigue.

Mrs. Harris admitted that, on occasion, she had upsetting experiences regarding other women in Dr. Tarnower's life. Once when they were in Paris together, he received a letter from another woman. On the same trip, she noticed that the underside of Tarnower's cuff links were engraved with a message from Tryforos.

Sometime in May, 1979, a report was prepared by a consulting firm regarding the administration of the Madeira School. The report called Harris the most controversial head of any school in the country and recommended that the board fire her immediately. Mrs. Harris was traumatized, but the board of directors retained her as headmistress. Nevertheless, she was given two different versions of the board's vote on her retention and was left with the impression that she was on probation. All this made her realize that she would soon have to move on.

She spent the Christmas holidays in 1979 with Tarnower in Florida. Sometime later, she spoke with Suzanne van der Vreken about the details of a prewedding party for her son, David. Tarnower had asked her to arrange the affair directly with Suzanne. Mrs. Harris stayed at Tarnower's house for four days over the weekend of the party, spending each night with him in his bedroom. After the party, Mrs. Harris wrote to thank Tarnower for his generosity. Her note, which was read into evidence at trial, made unflattering references to Tryforos. It read in part: "[Y]ou will never be able to think of men and women as equals — but the truth is darling if one of the few women you do admire *** were to adopt the male equivalent of Lynn as lover and richly rewarded 'boy Friday' you wouldn't ask them back to dinner a second time."

From February 24 to March 5, 1980, Mrs. Harris was on a fund-raising trip for the Madeira School. She made stops in Denver, Colorado Springs, San Diego, Seattle, San Francisco and Los Angeles, visiting schools, alumni and parents of prospective students. She felt extremely tired during the trip and took the medication prescribed by Dr. Tarnower. Upon her return, she was told that a basket full of drug paraphernalia and the remains of smoked marihuana had been found in the dormitory rooms of some senior students. Mrs. Harris confronted the girls and they admit-

ted that they owned the material. Harris then called a student council meeting, following the usual procedure for serious disciplinary problems. The meeting was held that night at Harris' house. She acted as chairman and opinions ran the gamut from demands that the girls be immediately expelled to pleas that expulsion was far too severe. The final vote was for expulsion, but Harris' concurrence was necessary for that action. She directed that the girls be expelled.

On Thursday, March 6, 1980, Mrs. Harris exhausted her supply of medication. Over the weekend she began to write a new will, and also wrote a long letter to Tarnower. On Monday, March 10, she completed the will and had it witnessed and notarized. She also mailed the letter to Tarnower that morning. The letter, which came to be known as the "Scarsdale Letter", contained several disparaging references to Lynn Tryforos. It also made reference to a dinner scheduled to be held on April 19, 1980, when Tarnower was to be honored by the Westchester Heart Association. Harris testified that although Tarnower had invited her to that affair, he felt that Tryforos should be there as well. According to Harris, Tarnower did not know precisely what to do about this dilemma. Harris had told him that she felt it was very important for her to be there and that she wanted to honor him.

Mrs. Harris testified that the so-called "Scarsdale Letter" accurately reflected her troubled state of mind when she wrote it, and she described it as "shrieking with [her] pain". The letter, which was introduced into evidence by the prosecutor during Mrs. Harris' cross-examination, stated that she was distraught over Tarnower's telephone message that he "preferred the company of a vicious, adulterous, psychotic". Mrs. Harris spoke of receiving a copy of Tarnower's will "with my name vigorously scratched out, and Lynn's name, in *your* handwriting written in three places, leaving her a quarter of a million dollars and her children $25,000 apiece — and the boys and me nothing." Mrs. Harris' letter continued, "[A]ll I ever asked for was to be with you — and when I left you to know when we would see each other again so there was something in life to look forward to. Now you are taking that

away from me too and I am unable to cope." Tryforos was variously described as "a thieving slut," "a psychotic whore," and a "sick playmate." Mrs. Harris referred to a book of epigrams which she had found on Tarnower's bed with a page marked dealing with "how an old man should have a young wife." Mrs. Harris wrote, "It made me feel like a piece of old discarded garbage — but at least it solved for me what had been a mystery — what had suddenly possessed you to start your tasteless diatribes at dinner parties about how every man should have a wife half his age plus 7 years. Since you never mentioned it to anyone under 65, it made the wives of *[sic]* the table feel about as attractive and wanted as I did." Mrs. Harris referred to a luncheon she had attended with the doctor at which Tarnower had discussed Lynn and her "wonderful family". Mrs. Harris observed, "I can't imagine going out to dinner with you and telling my dinner partner how grand another lover is." In another portion of the letter, Mrs. Harris wrote: "It would have been heartbreaking for me to have to see less and less of you even if it had been a decent woman who took my place. Going through the hell of the past few years has been bearable only because you were still there and I could be with you whenever I could get away from work, which seemed to be less and less. To be jeered at, and called 'old and pathetic' made me seriously consider borrowing $5,000 just before I left New York and telling a doctor to make me young again — to do anything but make me not feel like discarded trash — I lost my nerve because there was always the chance I'd end up uglier than before." Mrs. Harris continued, "You have been what you very carefully set out to be, Hi[3] — the most important thing in my life, the most important human being in my life and that will never change. You keep me in control by threatening me with banishment — an easy threat which you know I couldn't live with and so I stay home alone while you make love to someone who has almost totally destroyed me. I have been publicly humiliated again and again but not on the 19th of April. It is the apex of your career and I believe I have earned the right to watch it — if only from a dark corner near the kitchen." The letter

3. Apparently, Mrs. Harris would spell Tarnower's nickname "Hi" rather than "Hy".

concluded: "I would far rather be saved the trial of living without you than have the option of living with your money. Give her all the money she wants, Hi — but give me time with you and the privilege of sharing with you April 19th *** She has you every single moment in March. For Christ sake give me April — T.S. Eliot said it's the cruelest month — don't let it be, Hi. I want to spend every minute of it with you on weekends. In all these years you never spent my birthday with me. There aren't a lot left — it goes so quickly. I give you my word if you just aren't cruel I won't make you wretched. I never did until you were cruel — and then I just wasn't ready for it."

Mrs. Harris testified that, on Monday morning, March 10, she called Tarnower at his office. She told him that she had sent him a letter and she asked him to throw it away without reading it because she regretted having mailed it. She testified further that they then spoke of a number of things, and Tarnower invited her to come to Westchester on the weekend of April 5.

Later that day, Mrs. Harris received a letter from a student who had once been injured in a hazing accident at the school. After the accident, Mrs. Harris developed a strong affection for the girl, and the two had enjoyed a close relationship ever since. The letter was critical of Harris' handling of the disciplinary affair, and that criticism affected her deeply. She thought, "if she thinks I failed her, too, I had really blown the whole thing."

Mrs. Harris testified that this letter, combined with all that had preceded it, persuaded her that she could no longer function. It was then that she decided to take her own life.

She wrote several letters and notes, including one to the chairman of Madeira's board of directors in which she said "next time choose a head the Board wants and supports. Don't let some poor fool work like hell for 2 years before she knows she wasn't wanted in the first place." In a second note, she wrote, "I wish to be immediately cremated and thrown away."

Mrs. Harris began thinking about the walks she had taken with Tarnower on the grounds of his estate. She

thought particularly of the pond, and she remembered that Tarnower had once said that, when he died, he wanted to be cremated and have his ashes sprinkled on that pond. She thought that she too would like to die by the side of the pond where daffodils grew in the spring, and she decided that there was where she would go.

Before she left Madeira, she called Tarnower. He answered and she said, "Hy, it's been a bad few weeks and I'd like to come and talk to you for a few minutes." He told her that Debbie was coming for dinner that night, but she replied that that didn't matter because Debbie always left early and she couldn't get there before 10:30. He said that it would be more convenient if she came the next day, but she insisted, saying, "Hy, please, just this once let me say when." He replied, "Suit yourself." Mrs. Harris then made preparations to leave.

She took out the gun she had bought a year before, put a bullet in it, and took it out to her terrace. She pulled the trigger a number of times and, on the third or fourth attempt, the gun fired. She brought the gun back into the kitchen and poked out the spent cartridge with an ice pick. She then took several bullets and tried to fill each chamber of the cylinder because she did not want to play "Russian roulette" when she shot herself later. She thought she had filled the gun completely, and only later learned that she had put only five rounds in the cylinder. She also put a number of bullets in her coat pocket.

She then left her house to begin the journey. When she got to her car, she found a bouquet of flowers on the seat which had been placed there earlier by a teacher who was concerned about her condition. Mrs. Harris entered her vehicle, filled it with gas, and left. She intended to see Tarnower one more time before dying.

For the most part, Mrs. Harris had a peaceful trip, content with "the knowledge that [she] finally had come to the end of the road". At trial, she described her arrival at Tarnower's home and the ensuing events as follows:

"I stopped right in front of the front steps and I was sort of surprised not to see a light on, but I thought, well, maybe he left the door ajar and didn't want to leave a light on. So I

got out of the car and started up the steps, and then I remembered the flowers and I thought it would be nice to take him the flowers. So I went back and opened up the other side of the car and I reached in for the flowers and I had put them on top of my pocketbook and I picked up my pocketbook, too, and the flowers, and I closed the door and walked up the steps to the front door and it was locked ***

"I walked up the stairs and tried the doors and it *[sic]* was locked. So I just walked back downstairs and went in the way we usually went in, anyway, which was through the garage. I opened the garage door on the right-hand side, the one where Henri and Suzanne had their car, and then I walked around in back of Hy's car and I pushed the button for his door in order to make the light go on, so I could see what I was doing, and then I walked up to the first floor, and it was all dark there and quiet, and then I called to Hy from the bottom of the stairs and then walked upstairs ***

"I just called, 'Hy, Hy,' and I walked upstairs and he was just beginning to stir when I got to the top of the stairs ***

"I heard Hy just stirring and I walked over and sat on the edge of my bed and reached over and turned on the light, and the light over his bed went on ***

"Well, Hy was just waking up and rubbing his eyes and I said, 'Hi. I thought you would leave a lamp in the window, it's black as pitch out there,' and he was not enthralled to see me and he said, 'Jesus, it's the middle of the night,' *** and I said, 'It's not really that late and I'm not going to stay very long. I just came for a while to talk with you,' and he said 'Well, I'm not going to talk to anybody in the middle of the night,' and he turned toward me. He always had two pillows on his bed and he was lying on one and hugging the other one and he said, 'I don't feel like talking in the middle of the night', and he closed his eyes. So I sat for a minute thinking he would wake up. He usually woke up very quickly, because he was used to phone calls in the middle of the night and getting up and getting dressed and racing out to a patient very fast, but he didn't seem

inclined to wake up very fast that night, and I finally said, 'I brought you some flowers.' He didn't answer. And I said, after I waited a little while, 'Have you written any more on the book?' and he said, 'Jesus, Jean, shut up and go to bed,' and I said, 'I can't go to bed, dear, I'm not going to stay that long, I'm just going to be a little while', and I sat a while longer and he lay there hugging the pillow with his eyes closed, and I finally said, 'Won't you really talk to me for just a little while?' and he didn't answer, and I sat some more, and finally I said — I didn't want to leave yet. I was sure he would wake up and stick the other pillow in the back of his head and say, 'You're some kind of a nut to drive five hours in the middle of the night to talk, but what do you want to talk about?' So I was just kind of waiting."

Mrs. Harris then turned on the light and went into the guest bathroom. She saw a number of things, one of them a greenish blue satin negligee. The negligee was not hers. Mrs. Harris' account continued:

"I took it off the hook where it was hanging and I walked into Hy's room and threw it on the floor. And Hy was still paying no attention. I thought I saw the negligee land on the floor. I don't know. I went back in the bathroom. By this time I felt hurt and frustrated, because the script wasn't working out the way I expected it to. I had looked forward to a few more minutes with Hy and I guess I wanted to feel safe one more time and I thought it was a reasonable request, but it wasn't happening, and I walked back into the bathroom and I picked up a box of curlers and threw them. I really didn't know where they landed. I just threw them in the bathroom, I thought, but I guess they went out into the dressing room, and I heard the noise. They apparently broke a window, though I didn't know until many months later that they had broken a window, and as I walked out of the bathroom Hy was standing at the door and his arms swung out and he hit me across the face ***

"My first reaction was to want to throw something else. So I turned around and went back into the bathroom and picked up something. I didn't know until I was told in this courtroom what it was. But I picked up a box and threw that, too. I threw that and it went into a cosmetic bureau of

mine and smashed that and then scattered around on the floor."

Tarnower struck her again, and the blow seemed to have a sobering effect:

"I didn't have any desire to throw any more things. It just hadn't turned out the way I thought it would, and I simply wanted to get dying over with. The pleasant talk was not to be. So I calmed down and I walked in and I sat on the edge of my bed facing away from his and I put my hair behind my ears and I raised my face to him and I closed my eyes and said 'Hit me again, Hy, make it hard enough to kill' ***

"He didn't say anything. He stopped in front of me for an instant, I guess. It was long enough, so I wondered how much it would hurt if he did it, but he didn't touch me again. He walked away, and he probably took a great deal of self-control, because I am sure he was very mad by then. But he didn't hit me again. He didn't say anything. He just walked away around my bed and over to somewhere near his bed. I never really saw exactly where he was standing right at that moment, and it was very quiet, and I got up, I think to go, and I walked around the foot of the bed and I picked up my pocketbook and I felt the gun and I unzipped the bag and took out the gun and I said, 'Never mind, I'll do it myself,' and I raised it to my head and pulled the trigger at the instant that Hy came at me and grabbed the gun and pushed my hand away from my head and pushed it down, and I heard the gun explode. It was very loud. It seemed very loud, because I didn't think I'd hear it, and Hy jumped back and I jumped back and he held up his hand and it was bleeding and I could see the bullet hole in it and he said, 'Jesus Christ, look what you did,' and we both just stood there and looked at it. I think he was as appalled as I was. I wasn't aiming the gun at Hy and I didn't even know he was looking at me, but he moved very fast and he was the one who was shot, and he stood and looked at it ***

"He sort of stared at the hand for a minute and then he turned and went into the bathroom, and I stood there for a little while. I didn't have I don't think exactly a normal reaction to it, because I couldn't believe it had happened.

Ordinarily if he sounded hoarse, I was upset if he didn't take a pill, but I didn't feel — I didn't rush to help him. I stood there and stared at him, and then I followed him into the bathroom, or I started following him into the bathroom ***

"I got about half-way around Hy's bed and I suddenly realized that the gun was still in here, and if I went back and got it fast enough, I could shoot myself before Hy — I could hear the water running and I thought I could get it over with before he even came back into the room. So I didn't go all the way into the bathroom with him. I turned around and went back and I looked at the foot of the bed and I didn't see the gun and I looked in between the beds and I didn't see it, and I got down on my knees and looked under my bed and it was there, and I reached under to get it. I was on my knees, down low, and I pulled it out, and as I pulled it out, Hy came out of the bathroom — I didn't actually see him at that moment. I didn't realize what he was doing until I could feel him, and I think he just flew over the bottom of the bed and he grabbed my left arm and he held it, very, very tightly and it hurt, and it made me drop the gun ***

"He picked up the gun. He held on to my arm for a while and he picked up the gun and then he got up and he walked over and sat on the ledge of his bed next to the little ledge where the telephone was and the buzzer and I was on my knees and looked at him and he looked at me and I came over in front of him — I don't think I got all the way up, I was kneeling in front of him and he buzzed the buzzer. He buzzed it several times ***

"And I came over to him and I was on my knees. From the time he first buzzed the buzzer I was panicked, because I was afraid Henri and Suzanne would come running up the steps any minute, and I said, 'Hy, please give me the gun, please give me the gun, or shoot me yourself but for Christ sake let me die,' and he looked at me and said, 'Jesus, you're crazy, get out of here,' and he pushed me aside and reached for the phone, because once you buzz the buzzer you have to pick up the phone and talk to someone on one of the other phones ***

"I pulled myself up on his knees, as a matter of fact, just holding on to them, and I was just about straight, and the gun was there. He wasn't holding it then. I think he put it on his lap by then. That's where I remember reaching for it, and as I got up, I grabbed for the gun and Hy dropped the phone and he grabbed my wrist and I pulled back and he let go and I went back on the other bed. I fell back the way you would in a tug of war and Hy lunged forward at me, as though he were going to tackle me, and his hands came out like that, around my waist, and there was an instant where I felt the muzzle of the gun in my stomach. I thought it was the muzzle of the gun, and I had the gun in my hand and I pulled the trigger and it exploded again, with such a loud sound, and my first thought was: my God, that didn't hurt at all, I should have done it a long time ago. And then Hy fell back and I got up and ran."

Mrs. Harris testified that she stopped at the head of the bed near the closet and put the gun to her head. She took a deep breath and pulled the trigger, but the gun did not fire. She examined the weapon, holding it downward. She pulled the trigger again and the gun fired. She then put the weapon back to her head and pulled the trigger repeatedly, but the gun "just clicked". Mrs. Harris decided to reload the weapon and she looked for the bullets she had carried with her in the pocket of her coat. Although she found them, she could not load them into the gun because she was unable to empty the cylinder of the spent cartridges. She tried banging the gun on the tub but she could not dislodge the cartridges. Instead, she managed only to break the cylinder of the weapon. When she realized that the gun was now inoperable, she walked back into Tarnower's room and saw him drop the receiver of the telephone. He then turned and was pulling himself up onto the bed. Mrs. Harris picked up the telephone but heard no dial tone. She replaced the receiver and said, "Hy, it's broken. I think it's gone dead." Tarnower responded, "You're probably right." That was the last thing Mrs. Harris ever heard him say.

Mrs. Harris helped the doctor onto the bed. He looked exhausted, but did not appear to be in grave condition. Mrs. Harris ran downstairs and to the front door, calling to Mrs. van der Vreken that she was going for help. She got

into her car and drove toward a nearby community center where she knew there was a public telephone. On the way she saw a police car with flashing lights. She turned her own car around and headed back toward Tarnower's residence. The patrol car followed.

When they pulled up in front of the house, Mrs. Harris ran to the patrol car and urged the patrolman to hurry. As they ran up the steps they encountered Henri and Suzanne. Henri was screaming hysterically, "She's the one, she did it, she's the one." They all then went up to Tarnower's bedroom.

Suzanne knelt on the floor beside the doctor, taking his hand and speaking softly to him. Mrs. Harris then lay across the bed and caressed his face. She said, "Oh, Hy, why didn't you kill me?" Mrs. Harris observed that Tarnower "was trying to talk to us then, too, but he couldn't speak, and not three minutes before he spoke perfectly clearly."

At trial, Mrs. Harris insisted that she believed that she had only shot Tarnower in the hand and had said so to Detective Siciliano. She claimed that, contrary to the testimony of prosecution witnesses, there was very little blood near Tarnower and that only his hand was bleeding.

On cross-examination, Mrs. Harris strenuously denied that, during her telephone conversation with Tarnower on the morning of March 10, 1980, he had accused her of lying and cheating. She further denied that he had told her that she was going to inherit $240,000. Finally she denied that Tarnower had said to her, "God damn it Jean, I want you to stop bothering me."

C. THE PEOPLE'S REBUTTAL

In its rebuttal case, the prosecution called Mrs. Juanita Edwards. Mrs. Edwards testified that she had had an appointment with Tarnower at 10:00 A.M. on Monday, March 10, 1980. Upon her arrival at Tarnower's office, she was shown directly into an examining room which had a wall telephone. Tarnower had just started examining her when the telephone rang. He answered it and then said, "I'll take this call in my office." He placed the receiver on a bracket near the telephone and left the room without

severing the connection. Mrs. Edwards remained seated on the examining table and soon became aware of muffled voices coming through the receiver. She recognized one voice as Dr. Tarnower's and heard him say loudly, "Goddamn it, Jean, I want you to stop bothering me." The voices then became muffled again until Mrs. Edwards heard Dr. Tarnower say, "You've lied and you've cheated." Later, she heard Tarnower say, "Well, you're going to inherit $240,000." Thereafter, Tarnower returned to the examining room, replaced the receiver on the hook, and continued Mrs. Edwards' examination.

D. THE EXPERT TESTIMONY

An extraordinary amount of expert testimony was offered at trial on a variety of subjects. The major dispute turned out to be whether the bullet which entered and exited Dr. Tarnower's hand went on to cause his chest wound. The People contended that it did and that that fact would suggest that the injury to Tarnower's hand was a "defensive wound". The defense argued that the hand and chest wounds had been caused by two separate bullets. Opinions were offered in support of the prosecution's theory, and in contradiction to it, largely depending upon whether the particular expert was able to discern in the slides of the chest wound evidence of cells which were peculiar to the palmar surface of the hand. There was also conflicting testimony as to whether the wounds inflicted upon Dr. Tarnower were consistent with a struggle between someone of his size and someone of the size of Mrs. Harris. In addition, there was testimony indicating that a wound, presumably one of those inflicted upon Dr. Tarnower, had been in contact with the weapon.

To support her version of the shooting, Mrs. Harris called Herbert Leon MacDonell, the director of the Laboratory of Forensic Science and an adjunct professor of criminalistics at Corning Community College and at Elmira College. Professor MacDonell, a noted consultant in criminal cases, has special expertise in blood splatter analysis. MacDonell took measurements and examined the scene in an attempt to reconstruct the position from which each bullet was fired. Based upon his analysis of the blood splatters, he concluded that, after having been wounded,

Tarnower probably walked from the bed to the bathroom and back to the bed. He also was of the opinion that four of the five spent cartridges found in the cylinder of the weapon had been double struck by the hammer. This fact, coupled with the position of the cylinder when the gun was recovered, led MacDonell to offer the following sequence: the weapon was fired four times; the hammer then fell on the empty chamber; the gun was then fired one more time; and the trigger was pulled either four or five additional times, with the hammer falling on spent cartridges and possibly again on the empty chamber. MacDonell also concluded that the shot to Tarnower's hand was not the final shot.

Additionally, the defense called two psychiatrists to testify as to the effect of the sudden discontinuance of Desoxyn. Both agreed that a woman like Jean Harris, who had suddenly discontinued the use of the drug at the level at which she was taking it, would be expected to experience fatigue, anxiety, agitation, a sense of melancholy, and a tendency to feel pessimistic and easily overwhelmed by day to day stress.

At the close of evidence, in addition to the charges contained in the indictment, the defendant asked only that the lesser included offense of criminal possession of a weapon in the fourth degree be submitted to the jurors, this in the hope that they would find that Mrs. Harris' uncontroverted possession of the weapon had occurred in her "home." The prosecutor asked for the submission of manslaughter in the first degree, arguing that the jury could find an intent to cause serious physical injury rather than an intent to kill. The defendant objected, and the court denied the application. However, over the defendant's objection, the court granted the prosecutor's request to charge manslaughter in the second degree (reckless homicide) and, once that request was granted, the defendant asked for and received a charge on the lesser offense of criminally negligent homicide.[4]

4. Notwithstanding the substantial evidence of Mrs. Harris' distress and anxiety prior to and at the moment of the shooting, she deliberately chose not to have the jury consider the mitigating defense of extreme emotional disturbance (Penal Law, § 125.25, subd 1, par [a])—this, although the Trial Judge had suggested that such a charge would be an appropriate option.

After lengthy deliberations, the jury convicted Mrs. Harris of murder in the second degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

DETERMINATION ON APPEAL

Mrs. Harris begins her attack upon her conviction with a challenge directed at the trial court's refusal to excuse juror Marie West. During jury selection, Mrs. West revealed at side bar that one of her daughters had been arrested for a "flimflam" in Westchester County. She had hired a lawyer and, as far as Mrs. West knew, her daughter had appeared before a Grand Jury which had refused to indict her. Notwithstanding this revelation, Mrs. West was accepted by both sides and was sworn as a juror.

A week later, before a full jury had been selected, a conference was held in chambers. Assistant District Attorney Thomas Lalla, who was assigned to assist Prosecutor Bolen at trial and who had not been present at the earlier Bench conference, revealed that he had played a part in the dismissal of the case against Mrs. West's daughter. Mr. Lalla stated that, after he had learned of the substance of the Bench conference, he had checked his records and had discovered that the daughter had in fact been indicted but that thereafter the alleged victims of her offense had been unable to identify her. After she had submitted an alibi notice and had taken a lie detector test, Mr. Lalla had moved for the dismissal of the indictment in the interests of justice. Defense counsel thereupon asked for time to decide whether this information would affect his assessment of Mrs. West's impartiality.

[1] The following Monday, counsel moved to have Mrs. West excused as a juror. He challenged her for cause and, in the alternative, offered to exercise a peremptory challenge against her. The court denied the application because it was satisfied that there was no prejudice to the defense. The court stated that "under all of the circumstances there is not sufficient cause for me to withdraw the Juror and allow [defense counsel] to challenge for cause or peremptorily Mrs. West as a sworn Juror." Defendant

contends that the court's failure to excuse Mrs. West constitutes reversible error. We disagree.

We begin by restating what is the preferred policy in this State. As our Court of Appeals has said, "[T]he trial court should lean toward disqualifying a prospective juror of dubious impartiality, rather than testing the bounds of discretion by permitting such a juror to serve. It is precisely for this reason that so many veniremen are made available for jury service." (*People v Branch*, 46 NY2d 645, 651-652; see, also, *People v Provenzano*, 50 NY2d 420, 425.)

This court has repeatedly issued a similar caution. (See, e.g., *People v Sellers*, 73 AD2d 697; *People v Moorer*, 77 AD2d 575, 577.) The same policy has been held applicable to cases involving sworn jurors although, where a challenge is directed at a sitting juror, the burden upon the moving party is somewhat greater. (See *People v Meyer*, 78 AD2d 662, 664.) By failing to excuse Mrs. West, the Trial Judge here risked placing an eventual conviction in jeopardy. Nevertheless, we cannot conclude that he committed error.

The Criminal Procedure Law sections which control jury selection and which are pertinent to the issue at bar, provide in relevant part:

"§ 270.15 Trial jury; examination of prospective jurors; challenges generally * * *

"2. Upon the completion of [examination of a juror] by both parties, each, commencing with the people, may challenge a prospective juror for cause * * * After both parties have had an opportunity to challenge for cause, the court must permit them to peremptorily challenge any remaining prospective juror * * * The prospective jurors who are not excluded from service must retain their place in the jury box and must be immediately sworn as trial jurors * * *

"4. A challenge for cause of a prospective juror which is not made before he is sworn as a trial juror shall be deemed to have been waived, except that such a challenge based upon a ground not known to the challenging party at that time may be made at any time before a witness is sworn at the trial."

"§ 270.20 Trial jury; challenge for cause of an individual juror

"1. A challenge for cause is an objection to a prospective juror and may be made only on the ground that * * *

"(c) * * * he bears some other relationship to [counsel] of such nature that it is likely to preclude him from rendering an impartial verdict".

These statutes make no provision for a peremptory challenge of a sworn juror. And it has long been held that a defendant's rights are not impaired when he is precluded from challenging a sitting juror peremptorily. (See *People v Carpenter*, 102 NY 238, 248; see, also, *People v Mancuso*, 26 AD2d 292, 294.)

Mrs. Harris, however, cites *People v West* (38 AD2d 548, affd 32 NY2d 944) for the proposition that a peremptory challenge of a sworn juror is permissible. In *West*, during *voir dire*, a prospective juror assured the parties that he would not be prejudiced by the fact that the defendants may be shown to have been members of the Black Panther Party. After he had been sworn, the juror voluntarily came forward and revealed that he had participated in a demonstration at the courthouse in support of lower bail for the "Panther Twenty-one" and had signed petitions to that effect. He insisted, however, that he would be a fair and impartial juror. An Assistant District Attorney stated under oath that, had he known of the juror's activities, he would have exercised a peremptory challenge against him. His motion to excuse for cause was denied, and he then asked to exercise a peremptory challenge. The Trial Judge granted the application stating: "I have ruled on this under 371 of the Code that this juror although previously sworn *for good cause* is being excused on the exercise of peremptory challenge by the People".

Section 371 of the Code of Criminal Procedure, the former statute controlling challenges to sitting jurors, empowered the court to excuse a juror, although sworn, for good cause. In *West*, the Appellate Division, First Department, upheld the defendant's conviction noting (p 549) that "[w]hether the 'good cause' determination was triggered by the peremptory challenge or whether there was a mere

inartistic wording of the disposition of the challenge without a determination of 'good cause' may be debatable." Nevertheless, the court observed (p 549): "The information volunteered by [the juror] might reasonably be construed as indicating that he did not possess the requisite indifference."

We read the Appellate Division's decision in *West* as holding that, within the meaning of the then applicable statute, there had been "good cause" for the disqualification of the juror. Significantly, in a later case decided under the Criminal Procedure Law, this court had occasion to label as "gross error", a trial court's grant of a prosecutor's peremptory challenge directed against a sworn juror. (See *People v Chmarzewski*, 51 AD2d 554, 555.)

We conclude, therefore, that under the Criminal Procedure Law, a sworn juror may be challenged only for cause and not peremptorily. We turn then to the question of whether Mrs. West was vulnerable to such a challenge. Under the circumstances at bar, that question must necessarily turn on whether facts revealed *after Mrs. West was sworn as a juror* demonstrated that she bore some relationship to the prosecutors which was of such nature that it was likely to preclude her from rendering an impartial verdict.

In *People v Culhane* (33 NY2d 90), the Court of Appeals noted that, as compared to the former Code, the Criminal Procedure Law gives a Trial Judge greater flexibility and an increased responsibility in determining which potential jurors should be excused for cause. The court then offered illustrations of cases in which such a disqualification would be appropriate. A challenge for cause would lie, for example, where the prospective juror was a correction officer and the defendant was a convict charged with murdering a Deputy Sheriff *(People v Culhane, supra)* or where the potential juror was a Police Commissioner and the case involved the shooting of a police officer *(Commonwealth v Colon*, 223 Pa Super Ct 202), or where the prospective juror was related to a taxidriver, in a case involving a murder of a taxidriver *(Sims v United States*, 405 F2d 1381). (See *People v Culhane, supra*, at p 104, n 2.)

Later, in *People v Branch* (46 NY2d 645, *supra)*, the denial of a challenge for cause was held to be error where the prospective juror revealed that he was serving as a part-time police officer in a town located in the county of prosecution, that he had worked with the county District Attorney's office and, in some cases, had worked closely with the State's trial attorney, and that he had developed a personal relationship with that attorney. And, in *People v Sellers* (73 AD2d 697, *supra)*, we held it to be error for the trial court to have denied a robbery defendant's challenges for cause directed against a customs officer whose duties included the enforcement of law through making arrests, and against a woman whose son had been robbed and whose husband had been the victim of a knife-point mugging. On the other hand, the Court of Appeals upheld the denial of a challenge for cause directed against a prospective juror who revealed that she had met the trial prosecutor at several political rallies, that both were members of the same local political club, and that she had campaigned for the prosecutor in his race for election as part of her efforts for her party's ticket. *(People v Provenzano,* 50 NY2d 420, *supra.)* The question, then, of whether a prospective juror has the kind of relationship which falls within the scope of the statute is not always easy to resolve. In the case at bar, however, we are not called upon to examine any such relationship, for we conclude that the record demonstrates no relationship at all.

It is important at the outset to distinguish between the relevant and irrelevant factors in Mrs. West's background. It is entirely immaterial that Mrs. West's daughter was once arrested for an offense in Westchester County or that she had appeared with an attorney in the very courthouse in which the instant trial was to be held. Those facts were all known to defense counsel during the *voir dire* at a time when Mrs. West was subject to challenge. No such challenge was made, however, and she was accepted by both sides and sworn. What was unknown to the defense at that time, and what therefore constitutes the only relevant information here, is that Mrs. West's daughter had been indicted for the offense and that her case had been dismissed, not simply by the office of the District Attorney,

but on the motion of the very prosecutor who was assisting in the Harris case.

As previously indicated, the controlling statutes permit a challenge for cause only where there is "some *** relationship *** of such nature that it is likely to preclude [the prospective juror] from rendering an impartial verdict". (CPL 270.20, subd 1, par [c].) In our view, it is self-evident that such a relationship cannot exist unless the juror is aware of it. There is no indication in the record here that Mrs. West knew that Mr. Lalla had moved to dismiss her daughter's case or, indeed, that the District Attorney's office had played any role in that dismissal. Nor is there any suggestion before us that Mrs. West did have such knowledge but deliberately withheld it. (Cf. *People v Howard*, 66 AD2d 670.) Thus, there is no showing of a relationship within the meaning of the statute. Significantly, after Mr. Lalla made his revelation, defense counsel never asked for a further examination of the juror to determine, for example, whether she was in contact with her daughter and thereby might learn of Mr. Lalla's part in the dismissal.

Moreover, the defendant's present claim of prejudice seems to contradict her counsel's earlier view. As the trial progressed and as it became evident that it would extend over the Christmas holidays, several jurors expressed unhappiness because of the threat to travel plans they had previously made. The Trial Judge expressed a willingness to substitute an alternate juror if that became necessary. The substitution was avoided when an adjournment was declared covering the period in question. The adjournment was granted after, *inter alia*, defense counsel objected to any substitution, saying, "[W]e have chosen a jury and I would like to try the case before the twelve people we have chosen." One of the jurors who had complained about conflicting travel plans was Marie West.

In sum, we conclude that a sworn juror is not subject to a peremptory challenge under the Criminal Procedure Law. We further conclude, that since there is a total absence of any indication in the record that Mrs. West had knowledge of the prosecutor's role in the dismissal of her daughter's case, she was not vulnerable to a challenge for cause. We

therefore hold that the Trial Judge did not err in refusing to exclude her from the jury. (See *People v Sumpter*, 82 AD2d 869.)

We consider next the defendant's contention that she was deprived of a fair trial when the court denied her application for an order permitting her to inspect the Tarnower residence.

Mrs. Harris was represented by counsel in this case before Dr. Tarnower was pronounced dead. Indeed, two attorneys met her in the early morning of March 11, 1980, at the Harrison Police Station. Nevertheless, her omnibus motion, containing a request for "a physical inspection of the Tarnower house", was not made until May 27, 1980, some 60 days after her arraignment. Thus, not only was her request less than prompt, it was actually untimely and was subject to summary denial. (See *People v Selby*, 43 NY2d 791; CPL 240.80, 255.20, subd 1.) The court nevertheless considered the application and denied it "without prejudice to the defendant's making such a request to the executor of the estate of the deceased or to whomever has title to such property."

[2] The defendant contends that the court's denial of her application for an inspection was predicated on a statute which was no longer in effect, and that the applicable statute empowered the court to grant the request. The defendant argues further that the failure to permit her to inspect the premises was grievous error, resulting in the loss or destruction of evidence which would have supported her position at trial. Whatever the merits of her attack on the court's ruling, the defendant plainly suffered no prejudice thereby.

There is no indication that defense experts were ever refused access to the Tarnower home after the defendant's motion was denied. Indeed, the record is replete with testimony establishing that those experts, as well as Mrs. Harris herself, were permitted to visit the home on several occasions and to conduct tests in the bedroom in which Dr. Tarnower was shot.

Moreover, the cases upon which the defendant relies are clearly inapposite, for they deal with the intentional de-

struction or negligent loss of evidence by agents of the government. (See, e.g., *United States v Bryant*, 439 F2d 642 [government loss of tape recordings of motel room conversations between defendants and an undercover agent allegedly concerning the sale of narcotics]; *United States v Miranda*, 526 F2d 1319 [loss by government agents of a tape recording of a conversation between the defendant and an informant]; *United States v Picariello*, 568 F2d 222 [destruction of dynamite by Massachusetts authorities four months prior to the trial of a defendant accused of unlawfully transporting explosives in interstate commerce]; *United States v Pollock*, 417 F Supp 1332 [intentional destruction of notes of a Drug Enforcement Administration officer after they had been subpoenaed by a defendant who contended that he had been working as an undercover agent].) There is no suggestion in the case at bar that any property was intentionally destroyed by police. Instead, the claim appears to be that the authorities did not preserve certain evidence for a sufficient length of time to permit the defendant's experts to examine it. However, it would seem that, at least in major part, the defendant is a victim of her own tardiness.

For example, the rug in the bedroom, which the defense claims demonstrated that Dr. Tarnower had walked to the bathroom and back to the bed after having been shot in the hand, was not disposed of until two months after the shooting. The rug was retained at the house for that period at the request of the police who had photographed it. Significantly, Professor MacDonell, the witness whose testimony primarily concerned analysis of crime-scene evidence, was not retained by the defense until almost six months after the shooting. Finally, we note that there is no evidence that any representative of the defense ever made a request to the police or to the District Attorney's office to preserve any particular items of evidence. (Cf. *People v Emmons*, 99 Misc 2d 941.)

The defendant next contends that she was deprived of a fair trial when the court received Mrs. Edwards' testimony in rebuttal. The defendant maintains that this testimony was offered to prove criminal intent, and therefore should have been presented as part of the People's case-in-chief.

The People respond that the trial prosecutor had determined that Mrs. Edwards' testimony was inadmissible in his direct case because he could not show that Mrs. Harris had actually been a party to the overheard telephone conversation.

The prosecution did possess evidence that a telephone, available to Mrs. Harris at the Madeira School, was used to place a call to Dr. Tarnower's office at approximately the time at which Mrs. Edwards claims to have overheard the conversation. In addition, Mrs. Edwards testified that she heard Tarnower use the name, "Jean". Nevertheless, having never met Mrs. Harris, Mrs. Edwards was unfamiliar with her voice. Moreover, she testified that the caller's voice sounded muffled and indistinct.

[3] Significantly, the People rested without calling Mrs. Edwards to the stand and before learning that Mrs. Harris would testify on her own behalf. Thus, had Mrs. Harris not taken the stand, the prosecution would have lost forever Mrs. Edwards' testimony. Once Mrs. Harris chose to testify, of course, her testimony regarding the telephone conversation was a sufficient predicate to support the admissibility of Mrs. Edwards' testimony.

The question of authentication of a telephone conversation is a difficult one where the witness is unable to testify to a recognition of the caller's voice. In *Mankes v Fishman* (163 App Div 789, 795), the court observed that: "the identity of [a party to a telephone conversation] may be established by means other than the recognition of the voice *** and a conversation otherwise admissible is properly received in evidence when from all the circumstances the identity of the [party] has been established with reasonable certainty."

More recently, in *People v Lynes* (49 NY2d 286, 292), the Court of Appeals wrote that: "while in each case the issue is one to be decided upon its own peculiar facts, in the first instance the Judge who presides over the trial must determine that the proffered proof permits the drawing of inferences which make it improbable that the caller's voice belongs to anyone other than the purported caller". (See, also, *People v McKane*, 143 NY 455, 474; *Ottida, Inc. v*

*Harriman Nat. Bank & Trust Co. of City of N. Y.*, 260 App Div 1008; *Van Riper v United States*, 13 F2d 961, 968, cert den *sub nom. Ackerson v United States*, 273 US 702.)

Whether, in the case at bar, there was sufficient evidence to authenticate the telephone conversation and thereby to permit Mrs. Edwards' testimony to be received in the People's direct case presents a close question. We need not resolve the issue, however, because we hold that, in any event, Mrs. Edwards' testimony was proper rebuttal evidence.

The general rule is that "[r]ebutting evidence *** means, not merely evidence which contradicts the witnesses on the opposite side and corroborates those of the party who began, but evidence in denial of some affirmative fact which the answering party has endeavored to prove." *(Marshall v Davies*, 78 NY 414, 420.) Thus, for example, where a defendant offers an alibi defense, the People may not offer evidence in rebuttal which merely places the defendant at the scene of the crime. Although such proof clearly contradicts the alibi, evidence of the defendant's presence at the scene of the crime is a necessary part of the People's direct case, and, thus, is improper rebuttal. In contrast, proper rebuttal evidence in an alibi case would be proof demonstrating that the defendant was not where he claims to have been. (See, e.g., *People v Baylis*, 75 Misc 2d 397; *People v Olsen*, 100 Misc 2d 947; see, also, *People v Richardson*, 25 AD2d 221.)

As the defendant correctly contends, intent to kill is a necessary element for a conviction of the crime of murder, and therefore must be proved by the prosecution on its direct case. Contrary to the defendant's view, however, Mrs. Edwards' testimony did not in truth tend to establish Mrs. Harris' intent to kill. Indeed, she heard nothing said by Mrs. Harris at all, and Dr. Tarnower's statements did not suggest that he was in any danger. Rather, the relevance of Mrs. Edwards' testimony lay in its tendency to *disprove* the alternative state of mind proffered by the defendant at trial.

Mrs. Harris did not simply deny having had an intent to kill Dr. Tarnower; she presented evidence of an alternative "state of mind". She insisted that she had been intent on

taking her own life, and claimed to have been motivated by her feelings of inadequacy and her inability to continue to function as a useful human being. She vigorously denied that Tarnower's relationship with Tryforos or any other woman played a significant part in her decision. She repeatedly stressed that Tryforos posed no threat to her own relationship with Tarnower, which she portrayed as one of mutual love. Specifically, she described her conversation with Tarnower on the morning of the homicide as being nothing more than one of their usual pleasant exchanges, and indeed, she claimed that he invited her to spend the weekend of April 5 at his home. Mrs. Edwards' testimony was offered to disprove the defendant's alternative state of mind by showing that her relationship with Tarnower was not as she claimed it to have been. Thus, the Edwards' testimony was offered "in denial of [an] affirmative fact which the [defendant] *** endeavored to prove." *(Marshall v Davies,* 78 NY 414, 420, *supra.)* It was therefore properly received in the People's rebuttal case.

[4] Mrs. Harris next levels a vigorous attack upon the conduct of the prosecutor. She claims first that she was severely prejudiced by massive pretrial publicity which, she suggests, was intentionally generated by the prosecution. The record, however, does not support her claim.

It is true that the case was widely reported in the media. However, pretrial publicity, even if pervasive and concentrated, does not necessarily lead to an unfair trial. (See, e.g., *Nebraska Press Assn. v Stuart,* 427 US 539, 565.) Moreover, defense counsel himself participated in much of the coverage of the case, presenting Mrs. Harris' contentions on television and in the print media. Significantly, when proceedings began, Mrs. Harris did not argue that she was unable to receive a fair trial in Westchester County. She did not seek a change of venue, nor did she request a postponement of trial to permit public attention to subside. (Cf. *Irvin v Dowd,* 366 US 717; *Nebraska Press Assn. v Stuart, supra,* at pp 563-564.)

The defendant observes that the District Attorney's decision to file with the indictment a notice containing the substance of statements made by Mrs. Harris on the night of the shooting allowed the press to gain ready access to

those statements. The prosecutor represents that, in taking that action, he was simply following his usual practice. Prosecutors' offices throughout the State follow a similar procedure, often filing with the court a voluntary disclosure form containing the substance of any statement the defendant is alleged to have made. The controlling statutes are not entirely clear as to whether a defendant's statements need be filed with the court and therefore be made public. (Compare, e.g., CPL 200.90, subd 1, with CPL 240.20.) It might well be appropriate for the Legislature to re-examine the disclosure statutes with a view toward permitting a court to shield a defendant's statements from public disclosure pending a determination of their admissibility.

In any event, we cannot find the prosecutor's conduct here to have been prejudicial to the defendant. The purpose of restricting press access to a defendant's statements is to insure that potential jurors are not tainted by exposure to evidence which is subsequently ruled inadmissible. (See, e.g., *Matter of Gannett Co. v De Pasquale*, 43 NY2d 370, 378, affd 443 US 368; *Matter of Westchester Rockland Newspapers v Leggett*, 48 NY2d 430, 438, 439.) Here, none of the defendant's statements was suppressed, and therefore the early access to them enjoyed by the press did not inure to the defendant's prejudice. For the same reason, the defendant was not prejudiced by the court's refusal to exclude the public from the pretrial suppression hearing.

[5] The defendant next contends that the prosecutor engaged in unfair cross-examination, compelling her to characterize the People's witnesses as liars. (See, e.g., *People v Delgado*, 79 AD2d 976; *People v Ormond*, 73 AD2d 629; *People v Crossman*, 69 AD2d 887.) This contention is, at best, disingenuous. It was the defendant herself who, during cross-examination, spontaneously accused several prosecution witnesses of committing perjury. Similarly, the defendant's argument that the prosecutor attempted to inject flagrant and prejudicial references to her social standing is entirely devoid of merit. Mrs. Harris herself initiated the colloquy of which she now complains by her remark that "it's not like me to rub up against people like [Lynn Tryforos]". Moreover, the exchange was hardly com-

parable to the situation in *People v Walker* (66 AD2d 863), cited by the defendant, where the prosecutor blatantly injected prejudicial racial references throughout his summation.

Mrs. Harris further argues that she was deprived of a fair trial when the prosecution invaded the councils of the defense. During trial, it was revealed that Prosecutor Bolen had had a telephone conversation with Dr. Francis Ryan, the Chief Medical Examiner for the State of Maine and a former Deputy Medical Examiner of Westchester County, who had been retained by the defense as an expert witness. The defense moved for a mistrial, and the court conducted a hearing to inquire into the circumstances surrounding Bolen's conversation with Ryan. Bolen testified that he knew Ryan professionally and socially and had called him to thank him for a Christmas card. Bolen subsequently turned the conversation to the Harris case, and to the possibility that the bullet that had entered Tarnower's hand had gone on to cause his chest wound. Dr. Ryan suggested that the way to determine whether that had occurred was to examine the slides of the chest wound for any evidence of palmar tissue. After his conversation with Ryan, Bolen asked Dr. Roh, the Medical Examiner, to conduct such a test. Both Dr. Ryan and Dr. Roh did conduct the test and each reported his findings in court. Dr. Ryan testified that, in his examination of the slides of the chest wound, he found no evidence of palmar cells. Dr. Roh testified that such cells were present.

[6] We find no merit in the defendant's contention that Bolen's telephone call to Dr. Ryan amounted to an unconstitutional invasion of the councils of the defense. In general, cases which condemn such invasions involve the placement of an informer in the defense camp (see, e.g., *Hoffa v United States*, 385 US 293), or electronic surveillance of defense communications. (See, e.g., *O'Brien v United States*, 386 US 345.) The defendant has directed us to no authority, however, which would prohibit a prosecutor from speaking with a potential witness for the defense. We think such conversations are permissible so long as the prosecutor does not suggest or imply that the witness is in any way obligated to converse with him. In the case at bar,

Bolen testified that he did advise Dr. Ryan that he was under no obligation to speak with him regarding the case. Moreover, not only was the prosecutor entitled to attempt to speak to a defense witness, but any effort by defense counsel to prevent the witness from speaking to the prosecutor might well have constituted an ethical violation. (See American Bar Association, Formal Opn No. 131; Wise, Legal Ethics [2d ed], p 294, and 1979 Supp, p 114.) In any event, we can perceive no prejudice to the defendant as a result of Bolen's conversation with Ryan. Had that conversation not occurred, and had Ryan testified as he did regarding the test in question, Bolen could have then simply notified Roh who could then have performed the test himself. We note that, even prior to the test, Dr. Roh had expressed the opinion in the course of his initial testimony that the bullet which passed through Tarnower's hand had also caused the chest wound.

[7] The defendant contends that the prosecutor delivered an unfair summation. The prosecutor's difficulty arose out of the fact that there was only one witness, Mrs. Harris herself, who purported to give a first-hand account of the events which occurred in the Tarnower bedroom on the night of the shooting. The prosecutor attempted to discredit her version and, in summation, suggested a different scenario based upon what he saw to be fair inferences to be drawn from the evidence presented. The defendant's complaint here, and at trial, was that the prosecutor's scenario was not fairly inferable from that evidence. We note, however, that the Trial Judge, prodded by defense objections, closely monitored the prosecutor's remarks. And a reading of the summation in its entirety leads us to conclude that it did not exceed the bounds of proper advocacy. (Cf. *People v Galloway*, 54 NY2d 396; *People v Ashwal*, 39 NY2d 105.) Moreover, the jurors were repeatedly reminded that it was their recollection, rather than that of counsel, that was to control.

[8] Mrs. Harris complains that the prosecutor unfairly referred to the wound in Tarnower's posterior shoulder as a "shot in the back." We find no prejudice to the defendant. If there was one thing that the jury knew at the conclusion of this trial it was the precise location of Dr. Tarnower's

wounds. One was inflicted to the posterior aspect of the shoulder, and the testimony was that the bullet traveled downward with a track that went slightly from back to front. Since there was never any real dispute over the location of Dr. Tarnower's wounds, and since the bullet did travel slightly from back to front, we conclude that the defendant's complaint on this point is of little merit.

[9] Mrs. Harris next contends that the prosecutor improperly invited the jury to perform tests in the jury room. The defendant would appear to be in no position to complain since, in defense counsel's summation, he twice invited the jurors to test Mrs. Harris' version in the deliberation room. The jurors apparently followed counsel's advice and attempted to re-enact the shooting during their deliberations. The results of this re-enactment convinced them that the shooting could not have occurred as Mrs. Harris described it. Having suggested to the jurors that they conduct an experiment, the defense is hard pressed to complain that they accepted the invitation with results adverse to Mrs. Harris. (See *United States v Hawkins*, 595 F2d 751, 753, cert den 441 US 910.)[5] In any event, we find no evidence of juror misconduct.

In general, a jury verdict may not be impeached by an attack on the conduct of the deliberations. (See, e.g., *People v Brown*, 48 NY2d 388, 393.) Nevertheless, a verdict may be overturned upon a showing of improper influence, embracing not merely corrupt attempts to affect the jury process, but jury conduct which tends to put the jurors in possession of evidence not introduced at trial. *(People v Brown, supra.)* Thus, a verdict may be found to be tainted where a single juror conducts a "test" outside of the deliberations room and reports the results to the jury *(People v Brown, supra)*, or where the jury makes use of objects which have not been introduced into evidence *(United*

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5. It is of some interest that, during redirect examination of a defense expert, counsel asked the witness a question concerning the likely position of Dr. Tarnower. In doing so, defense counsel asked the witness a question concerning the likely position of Dr. Tarnower. In doing so, defense counsel asked the witness to assume that the desks in the courtroom were the beds in the Tarnower bedroom. Perhaps this demonstration inspired the jurors to conduct the experiment to which complaint is now addressed.

*States v Beach*, 296 F2d 153), or where a nonjuror expresses an opinion to the jury regarding the defendant's guilt (*Parker v Gladden*, 385 US 363), or where the jury makes an unauthorized visit to the crime scene (*People v De Lucia*, 20 NY2d 275; *People v Crimmins*, 26 NY2d 319). In contrast, where the jurors attempt to re-enact the crime during their deliberations in accordance with their own recollection of the testimony, their conduct constitutes nothing more than an "application of everyday perceptions and common sense to the issues presented in the trial." (*People v Brown, supra*, at p 393.) Such conduct is permissible and does not taint a subsequent verdict. (See, e.g., *United States v Hephner*, 410 F2d 930; *State v Houston*, 209 NW2d 42 [Iowa]; *State v Thompson*, 164 Mont 415; *Hoover v State*, 107 Tex Cr Rep 600.)

[10] Mrs. Harris next contends that the court should have instructed the jury that one may have two homes within the meaning of the weapons possession statute. She also suggests that the court's definition of the word "home" was insufficient. Any argument that the court's charge on the meaning of "home" was erroneous, inadequate or incomplete, has not been preserved for review. As the record makes clear, at no time did defense counsel take issue with the court's definition of the term, or offer one which he felt would be more appropriate. Moreover, we see no flaw in the definition as given by the court. The question, then, is whether the court erred in refusing to charge that a defendant can have two homes within the meaning of the statute.

First, the court's charge on the question of Mrs. Harris' home did not explicitly state or imply that she could have only one home, nor was the jury ever asked to determine which of either, her house on the Madeira campus or the Tarnower estate, was her true home. Indeed at one point, the court simply told the jury: "You jurors have to decide whether [the Tarnower residence] was in fact *a home* * * * of Mrs. Harris on March 10, 1980." (Emphasis supplied.)

Second, the evidence quite clearly demonstrated that the Tarnower estate was not Mrs. Harris' home within the meaning of the statute. It is true that she testified that she liked to think of it as her home and that she used to buy

household items and keep certain of her personal belongings and clothing in the Tarnower house. However, she did not, for example, use the Tarnower estate at any time as a mailing or voting address, nor did she spend much time there in the year preceding March 10, 1980. (Cf. *People v Douglas*, 82 Misc 2d 971, 972.) Rather, by that date, Mrs. Harris had become a relatively infrequent visitor to the Tarnower home. Indeed, by her own testimony, she had to call Tarnower and virtually beg him to permit her to come to his home on March 10, 1980, and he only reluctantly agreed. And, in response to questioning on cross-examination, Mrs. Harris made a point of stating that she never came to the Tarnower residence unless she was invited to do so. It would seem self-evident that one does not generally need an invitation to return to one's own home. For these reasons, then, we conclude that no error was committed with respect to the court's charge on the question of the defendant's home. (See *People v Powell*, 54 NY2d 524.)

Finally, we come to the most difficult and troubling of the defendant's contentions. Mrs. Harris strenuously challenges the admissibility of the statement she made on the telephone to her attorney. That statement was overheard and testified to in court by Officer Tamilio.

The evidence presented at the suppression hearing established that, when Mrs. Harris asked to speak to her attorney, she had already admitted having shot Dr. Tarnower. She had been advised of her *Miranda* rights no fewer than three times. She had seen Dr. Tarnower carried down the stairs and out to a waiting ambulance, and this sight had apparently caused her to faint. When Lieutenant Flick later asked her if she wanted to call anyone, she replied that she wanted to call a lawyer friend in New York City. She was permitted to proceed unescorted to the kitchen to make such a call. However, the kitchen telephone was inoperable. Thereupon, having ascertained that there was a telephone in the servants' quarters, Lieutenant Flick placed a call at Mrs. Harris' request to her lawyer, Leslie Jacobson. When Jacobson asked to speak with Mrs. Harris, Flick returned to the foyer where the defendant was seated with Officer Tamilio. Flick told the defendant that the party she wanted was on the telephone

and asked Tamilio to assist her into the bedroom. Tamilio walked with Mrs. Harris, helping her to a chair near the telephone. The bedroom itself had two exits, the doorway through which Mrs. Harris had walked, and a sliding door which led out to the garden and off the Tarnower property.

When Mrs. Harris picked up the telephone, Tamilio retreated to the doorway. At the suppression hearing, he testified that, in a "nervous, sorrowful" voice, Mrs. Harris said to her attorney, "Oh, my God, I think I've killed Hy." The court refused to suppress the statement and, in summation, the prosecutor pointed to it as one of the indications that Mrs. Harris had had an intent to kill Tarnower.

Mrs. Harris now contends that the court's failure to suppress the statement constituted a violation of her right to counsel. Her argument is not similar to those usually advanced in connection with a failure to suppress statements. It is undisputed that she was advised of her constitutional rights at least three times — this by her own admission. Indeed, she signed a *Miranda* waiver card. It is similarly undisputed that, following her request to speak to an attorney, the police engaged in no further interrogation. The issue, then, does not involve the alleged unlawful questioning of a suspect who has requested counsel, or a contested waiver of *Miranda* rights. Rather, the question here concerns the extent of the obligation of the police to afford privacy to a suspect who, while in custody, confers with her attorney about the pending charge. And, since there seems to be no suggestion that Officer Tamilio intended to eavesdrop on Mrs. Harris' conversation, the issue may be more narrowly stated as whether a police officer may report in court a statement made by a suspect to his attorney which the officer had inadvertently overheard.

At the outset, we note that we find no police misconduct here. (Cf. *People v Grimaldi*, 52 NY2d 611.) Mrs. Harris had been arrested for a felony. The bedroom in which she was speaking had two exits. In retreating to the doorway of the room, Officer Tamilio afforded Mrs. Harris as much privacy as he could consistent with his obligation to retain custody and control over a person under arrest for a serious crime. Significantly, Tamilio did nothing to conceal his

presence from Mrs. Harris and, as testified, she spoke in the obvious presence of Henri van der Vreken, who was seated a few feet away from her. Nevertheless, the absence of police misconduct is not dispositive of the defendant's claim.

In *People v McLaughlin* (291 NY 480, 482-483) our Court of Appeals wrote that: "To give [the right to counsel] 'life and effect *** it must be held to confer upon [a defendant] every privilege which will make the presence of counsel upon the trial a valuable right, and this must include a private interview with his counsel prior to the trial'". (See, also, *Matter of Fusco v Moses*, 304 NY 424, 433.) Federal courts have held likewise. Thus, in *Coplon v United States* (191 F2d 749, 757, cert den 342 US 926), the court stated that, "[i]t is well established that an accused does not enjoy the effective aid of counsel if he is denied the right of private consultation with him." Indeed, it has been observed that "the essence of the Sixth Amendment right is *** privacy of communication with counsel." (*United States v Rosner*, 485 F2d 1213, 1224, cert den 417 US 950; see, also, *Weatherford v Bursey*, 429 US 545, 563 [MARSHALL, J. dissenting]; *Caldwell v United States*, 205 F2d 879.) Moreover, the courts of this State have shown a "special solicitude" for an accused's right to counsel, affording protections well beyond those required by the Federal Constitution. (See *People v Cunningham*, 49 NY2d 203, 207; *People v Hobson*, 39 NY2d 479.)

[11] In keeping with our State's policy of jealously guarding the right to counsel, we hold that, once that right has attached, no statement which a suspect directs to his attorney may be reported at trial by a police officer, regardless of whether he intentionally or inadvertently overheard it. (See *People v Rainey*, 34 AD2d 557, app dsmd 27 NY2d 748.) We conclude, therefore, that the court's refusal to suppress Mrs. Harris' statement to her attorney was error. After a careful reading of the entire record, however, we are convinced that the admission of the statement was harmless beyond a reasonable doubt. (See *People v Crimmins*, 36 NY2d 230.)

We note first that the prosecutor's attempt to use the statement in summation is not conclusive of its evidentiary

value. Indeed, his arguments seemed to be a misguided response to defense counsel's comment in summation which suggested that the statement was fully consistent with Mrs. Harris' version of the shooting. Defense counsel argued to the jury: "And later on, later on, after [Mrs. Harris] had been back up to see Hy, and of course Hy looked different when she came back than he looked when she left, she said to her lawyer on the phone, 'I think I've killed Hy.' And again, she was speaking the truth. Not 'I intended to kill Hy.'"

Prior to making the statement to her attorney, Mrs. Harris had told the police several times that she had shot Dr. Tarnower. Although she claims to have remembered shooting him only in the hand, and said as much to the detective at the scene, it is essentially undisputed that she, in fact, inflicted all of Tarnower's wounds. Indeed, at trial, Mrs. Harris did not suggest that she did not inflict those wounds, but only that she did not intend to do so. According to Mrs. Harris' testimony, when she returned to the house with Officer McKenna, she was still under the belief that Tarnower had suffered only a hand wound. When she saw him, however, he appeared to be in a far more serious condition than one who had received only a wound to the hand. Indeed, Mrs. Harris testified that Tarnower was no longer able to speak. Thereafter, Mrs. Harris saw the doctor, in obviously grave condition, being carried out of the house to a waiting ambulance. The sight of him so affected her that it caused her to faint. By this time, Mrs. Harris had indicated her awareness of the apparent fact that Tarnower was in danger of death, for she remarked to Lieutenant Flick that she thought it ironic that the doctor was dying, although it was she who wanted to die. It was subsequent to that realization, as expressed in her comment to Lieutenant Flick, that Mrs. Harris made the statement to her attorney.

In our view, the statement, "Oh, my God, I think I've killed Hy", made under these circumstances, neither indicates nor suggests an intent to kill on the part of Mrs. Harris. Indeed, it suggests the contrary since it reflects her surprise at Tarnower's condition and her uncertainty with

respect to her responsibility for that condition. Thus, the statement is fully consistent with Mrs. Harris' claim that the shooting of Dr. Tarnower had been unintentional. We, therefore, hold that the admission of Mrs. Harris' statement, although error, was harmless.

It has long been recognized that, although all trials must be fair, few can be described as perfect. (See, e.g., *People v Arce*, 42 NY2d 179, 187.) After a painstaking reading of this lengthy record, and a careful consideration of each of the defendant's arguments, we are convinced that, although Jean Harris did not receive a perfect trial, she received an eminently fair one. Nothing more is required.

Accordingly, we affirm the judgment in all respects.

HOPKINS, TITONE, WEINSTEIN and BRACKEN, JJ., concur.

Judgment of the County Court, Westchester County, rendered March 20, 1981, as amended May 6, 1981, affirmed.

## APPENDIX C

### OPINION OF THE COURT

GABRIELLI, J.

Defendant, Jean Harris, was convicted, following a jury trial, of murder in the second degree and criminal possession of a weapon in the second and third degrees. This appeal presents for our consideration several purported errors occurring during the course of that trial, which defendant urges mandate reversal of the judgment of conviction. Inasmuch as our resolution of these issues leads us to the conclusion that reversible error was not committed, there should be an affirmance.

Defendant's trial for murder arose out of the shooting death of Dr. Herman Tarnower in his home on March 10, 1980. The People's case proceeded on the theory that Mrs. Harris, who had been Dr. Tarnower's paramour and companion for nearly 14 years, went to his home on the evening of the shooting and, acting out of jealous rage over the doctor's relationship with a younger woman, deliberately shot and killed him. One of the prosecution's witnesses, Dr. Tarnower's house manager, testified to the difficulties that had resulted from the doctor's relationships with the two women. Mrs. Harris's oral statements, testified to by the police officers who were investigating the shooting, were also relied upon as evidence of her motivation in going to the Tarnower estate on the evening of the shooting. The prosecution also utilized the so-called "Scarsdale letter", written by Mrs. Harris to the doctor over the weekend prior to his death, as strong evidence of Mrs. Harris's state of mind. In this letter, which contained several unflattering references to the younger woman in Dr. Tarnower's life, Mrs. Harris described her feelings of anguish and rejection over the doctor's apparent preference for this younger woman.

The defense theory was that Mrs. Harris, physically agitated by the lack of medication she had been taking for some time and suffering from recent failures and disappointments in her professional life, had determined that she wanted to end her life. Intending to see Dr. Tarnower once more before she died, Mrs. Harris drove to his home on March 10, hoping only to speak with him for a few

moments. She entered the doctor's home and went into his bedroom, where she found him sleeping. Mrs. Harris was unable to rouse the doctor in order to have a conversation with him. Apparently upset by his lack of responsiveness and the presence of the belongings of the other woman in the bathroom, Mrs. Harris decided to kill herself there in the doctor's bedroom. According to Mrs. Harris, as she attempted to carry out her desire, the doctor, who had by now awakened, tried to prevent her from shooting herself. Several struggles ensued, during which Mrs. Harris's gun discharged, shooting Dr. Tarnower and inflicting four gunshot wounds from which he died. Evidence concerning Mrs. Harris's version of these events and her state of mind on the night of the shooting and previously thereto was presented largely through the testimony of Mrs. Harris herself. The defense also relied upon a will and certain letters, written by Mrs. Harris just prior to her departure for the Tarnower estate on March 10, to demonstrate her belief that she would never return to her home, because she intended to end her life. In addition, the defense offered a number of witnesses who testified that Mrs. Harris had indeed been distraught over recent events occurring in connection with her position as headmistress of the Madeira School.

Thus, the major and, indeed, critical issue at trial was whether, as the prosecution contended, defendant had deliberately shot Dr. Tarnower, intending to kill him, or, as the defense urged, the shooting had been accidental. This question was resolved by the jury in favor of the prosecution, and the legal sufficiency of the evidence upon which the verdict was based is not challenged on this appeal. Defendant claims, however, that numerous errors infected both pretrial proceedings and the trial itself, which operated to deprive her of a fair trial. We deal with these contentions separately below and engage in further discussion of the evidence in this case only insofar as it relates to the specific issues raised by defendant.

I

On the night of her arrest at the Tarnower residence, defendant made a statement over the telephone to her attorney. She contends that the introduction into evidence

of that statement, testified to by a police officer who overheard it, violated her right to counsel under the Constitution of this State. It appears that Mrs. Harris, having been read her *Miranda* rights several times, having waived those rights and made statements to the police officers who were investigating the shooting, was thereafter asked if she would like to make a telephone call. Mrs. Harris responded that she would like to call a lawyer friend. After an attempt to make this call at a nearby telephone was unsuccessful, one of the officers, Lieutenant Flick, went into the house manager's bedroom to place the call for Mrs. Harris. When the lieutenant reached Mrs. Harris's party, he left the bedroom to so inform her. Officer Tamilio, at Lieutenant Flick's request, assisted Mrs. Harris to the bedroom. When they entered the room, the house manager's husband was already there, standing a few feet from the telephone. Immediately upon picking up the telephone, Mrs. Harris made the statement: "Oh, my God, I think I've killed Hy". Its admission into evidence is now challenged.

It is clear that, at the time Mrs. Harris made this statement, her right to counsel had attached by virtue of her request to speak with an attorney (*People v Cunningham*, 49 NY2d 203). Once the right to counsel had been invoked, no further questioning of Mrs. Harris would have been permissible, unless she had affirmatively waived her rights in the presence of her attorney (*People v Rogers*, 48 NY2d 167; *People v Hobson*, 39 NY2d 479). Notwithstanding this rule, statements made by a defendant who has invoked the right to counsel may nevertheless be admissible at trial if they were made spontaneously. In order for such statements to be characterized as spontaneous, it must "be shown that they were in no way the product of an 'interrogation environment', the result of 'express questioning or its functional equivalent' " (*People v Stoesser*, 53 NY2d 648, 650).

[1] On the record before us, it is clear that no questioning of Mrs. Harris occurred after she invoked her right to counsel. The statement was neither induced, provoked nor encouraged by the actions of the police officers (see *People v Rivers*, 56 NY2d 476), who had been entirely solicitous of

Mrs. Harris's request to speak with a lawyer and had scrupulously honored her rights in this regard (cf. *People v Grimaldi*, 52 NY2d 611). There is nothing in the record to indicate that Officer Tamilio endeavored, by subtle maneuvering or otherwise, to overhear Mrs. Harris's conversation with her attorney. Indeed, the record reflects that this officer, having assisted Mrs. Harris to the telephone, was backing out of the room when he inadvertently overheard the statement. It appears, therefore, that the officer had no opportunity to remove himself from earshot before Mrs. Harris made the damaging statement. Thus, we are not presented with a situation in which the police have failed to respect a defendant's right to consult privately with an attorney. Under the circumstances of this case, we conclude that no violation of defendant's right to counsel occurred.

Although we hold today that a statement properly characterized as spontaneous is no less so simply because it was made to an attorney, a further aspect of the admissibility of such statements should be considered. Given that the communication received in evidence was made to an attorney, the attorney-client privilege is implicated, in addition to the right to counsel. This privilege protects those communications made by a defendant to an attorney that are intended to be confidential (*People v Buchanan*, 145 NY 1; *Baumann v Steingester*, 213 NY 328). It cannot be said, on the facts of this case, that Mrs. Harris, in speaking over the telephone to a lawyer in the known presence of both a police officer and the house manager's husband, intended this communication to be confidential.[1] Generally, communications made in the presence of third parties, whose presence is known to the defendant, are not privileged from disclosure (see Richardson, Evidence [10th ed], § 413; 8 Wigmore, Evidence [McNaughton rev], § 2311). We see no reason to depart from this general rule simply because one of those parties present was a police officer, who, as has

1. Thus, this case does not present a situation in which it is claimed that defendant, through actions occurring subsequent to the confidential communication, has waived the attorney-client privilege (*People v Lynch*, 23 NY2d 262, 271). Rather, in this case, defendant's choice to speak to an attorney in the presence of third parties effectively prevented the privilege from attaching.

been noted, did nothing to purposely overhear the conversation or conceal his presence from defendant.[2] Thus, we conclude that defendant's attorney-client privilege was not violated by the officer's testimony regarding this communication and that the testimony was properly admitted by the trial court.

II

[2] The next issue to be considered is whether defendant was denied a fair trial by the prosecution's use of certain evidence in rebuttal. On direct examination, Mrs. Harris testified that, on the morning of March 10, she called Dr. Tarnower at his office in the Scarsdale Medical Center from her private telephone. Mrs. Harris stated that she and the doctor spoke of a number of things, and the doctor invited her to spend an upcoming weekend with him. On cross-examination, Mrs. Harris strenuously denied that, during the conversation, the doctor told her that she had lied and cheated, that she was going to inherit $240,000 or that he wanted her to stop bothering him. The prosecution then offered in rebuttal the testimony of a patient of Dr. Tarnower's who had been in an examining room with the doctor on the morning of March 10, when a telephone call was put through. The doctor answered the telephone in the examining room, but left the room to complete the conversation without severing the connection to the examining room. The patient overheard parts of the ensuing conversation, and although the voices were muffled and indistinct, she heard the doctor make the following statements: "God damn it, Jean, I want you to stop bothering me"; "You've lied and you've cheated"; "Well, you're going to inherit $240,000". We agree with the Appellate Division that this evidence was proper rebuttal.

The prosecution, of course, had the burden of establishing that Mrs. Harris intended to kill Dr. Tarnower. To this end, evidence was introduced in an attempt to establish

2. We recognize that the questions of whether defendant's right to counsel or attorney-client privilege have been violated may involve very similar factual inquiries, because the actions and purpose of the police are relevant to both questions.

that Mrs. Harris was in a jealous rage over the doctor's relationship with another woman. Mrs. Harris sought to controvert this theory of her state of mind by offering evidence that she acted solely out of her desire to end her own life and not out of any intent to harm the doctor, whose need for other women she had come to understand and accept. Mrs. Harris's direct testimony regarding the telephone conversation she had with the doctor on the morning of the shooting tended to confirm her view that all was well in their relationship.

It was proper, thereafter, for the prosecution to attempt to rebut Mrs. Harris's version of the nature of that relationship by introducing evidence concerning statements made by the doctor during the telephone call, which had been denied by Mrs. Harris. The rules concerning the proper scope of rebuttal evidence are clear. The party holding the affirmative of an issue must present all evidence concerning it before he closes his case. Thereafter, that party may introduce evidence in rebuttal only.[3] "Rebutting evidence in such cases means, not merely evidence which contradicts the witnesses on the opposite side and corroborates those of the party who began, but evidence in denial of some affirmative fact which the answering party has endeavored to prove" (*Marshall v Davies*, 78 NY 414, 420; see *People v Bonier*, 189 NY 108, 121). In the present case, the prosecution offered the testimony of Dr. Tarnower's patient not to establish an element of its case-in-chief (i.e., intent to kill), but merely to contradict Mrs. Harris's testimony and to disprove the alternate state of mind offered to explain her actions. That being the case, the evidence was properly received in rebuttal even if it could have been offered on direct (*Ankersmit v Tuch*, 114 NY 51; see 6 Wigmore, Evidence [Chadbourn rev], § 1873, pp 678-679). As we said in *Ankersmit* (114 NY, at p 55): "It is doubtless true that the evidence was competent and could have been introduced by the plaintiffs as a part of their affirmative

3. Under some circumstances, the trial court has discretion to allow subsequent evidence which is not strictly rebuttal evidence. This point is discussed *infra*.

case for the purpose of showing an intent to cheat and defraud, and that their neglect to introduce it at that time deprives them of the right to make use of it as affirmative evidence. But a party has the right to impeach or discredit the testimony of an opponent, and such evidence is always competent. He may contradict the testimony of a witness as to any matters upon which he has been called to give evidence in chief, provided it is not collateral to the issue".

In any event, even if the evidence were not technically of a rebuttal nature, we believe that the trial court, in allowing its introduction, properly exercised the discretion afforded by CPL 260.30 (subd 7). This statute provides that the court may permit either party, in the interest of justice, to offer evidence which was more properly a part of the direct case. Defense counsel and the prosecutor engaged in extensive discussion with the Trial Judge concerning the admissibility of the patient's testimony on the People's direct case. Although the prosecution had some evidence in its possession indicating that the person making the telephone call overheard by the patient was Mrs. Harris, it nevertheless believed that it could not lay a proper foundation for the receipt of this testimony in evidence, particularly given the fact that the patient had never heard Mrs. Harris's voice before and thus could not identify it (cf. *People v Lynes*, 49 NY2d 286). Once Mrs. Harris testified that she had indeed made this call, however, the previous authentication problem was obviated. Considering the difficulties faced by the offer of such proof on the People's direct case and the subsequent testimony of Mrs. Harris which provided the appropriate foundation for the People's proof, we believe that the trial court could properly exercise its discretion to allow the People to introduce such evidence as rebuttal.

III

On the eve of pretrial hearings, defendant requested, by oral motion, that the press be excluded from attendance at preliminary hearings. There is no doubt that substantial publicity surrounded the developments in this case concerning Dr. Tarnower's death and defendant's impending prosecution. Nevertheless, the trial court refused to close

the pretrial proceedings, finding that the statements which were the subject matter of the suppression hearing had been known to the public for months and that defense counsel himself had been listed as the source of some of the commentary on the case. The court, considering both the defendant's right to a fair trial and the right of the press and the public to attend criminal proceedings, concluded that it had not been shown that closure of the suppression hearings was necessary to ensure that an impartial jury would be impaneled.

*Matter of Gannett Co. v De Pasquale* (43 NY2d 370, affd 443 US 368) is the first in a recent line of cases dealing with the right of access by the press and public to criminal proceedings. In *Gannett*, this court held that where press commentary on pretrial suppression hearings would threaten the impaneling of an impartial jury, by making available to the public the details of evidence sought to be suppressed as tainted by illegality, such hearings are presumptively to be closed to the public (43 NY2d, at p 380). Although the United States Supreme Court's affirmance in *Gannett* was based upon its view that the Sixth Amendment guarantee of a public trial is personal to the accused and does not afford the press and public a separate right of access to pretrial proceedings (443 US, at pp 387-391),[4] this court subsequently indicated that the concept of a public trial is not so narrowly viewed in this State (*Matter of Westchester Rockland Newspapers v Leggett*, 48 NY2d 430,

4. The Supreme Court found it unnecessary to determine whether such a right of access to pretrial proceedings is guaranteed the press and public by virtue of the First Amendment. The court held that, assuming such a right to exist, it was given appropriate deference by the trial court in that case (*Gannett Co. v De Pasquale, supra*, at pp 392-393), inasmuch as the closure decision was based " 'on an assessment of the competing societal interests involved' " (*id.*, at p 393). In other words, any right of access on the part of the press was outweighed by the defendants' right to a fair trial.

The Supreme Court has since determined that the right of the public to attend criminal trials is implicit in the guarantees of the First Amendment (*Richmond Newspapers v Virginia*, 448 US 555; see, also, *Globe Newspaper Co. v Superior Ct. for County of Norfolk*, _ US _, 102 S Ct 2613), but it has not yet reached the question of whether that right extends also to pretrial proceedings (see *Richmond Newspapers v Virginia, supra*, at p 599 [STEWART, J., concurring]).

437). In addition to discussing the factors which must be considered in determining whether the public right to attend pretrial proceedings outweighs the defendant's right to a fair trial free of the potentially prejudicial impact of publicity concerning evidence subject to possible suppression, these cases laid down the procedural framework within which the possibility of closure of pretrial proceedings must be assessed.

It must be emphasized, however, that in these cases, we dealt with demands by the press to gain access to pretrial proceedings. The issue of whether such access could be denied was decided in the context of a closure order granted on the request of defendant, without opposition by the prosecution. In contrast, the present case involves the denial of a motion to close the pretrial proceedings, which had been opposed by the prosecutor as well as the press. Thus, the posture of this case differs in an important respect from that in *Gannett* and *Westchester Rockland Newspapers*, for here it is not the press asserting that a pretrial hearing should not have been closed; rather, it is the defendant who argues that the failure to close the pretrial hearing resulted in the denial of a fair trial.

Where this latter claim is asserted, it is not sufficient to demonstrate that a closure order may have been warranted and would have withstood an attack by the press. The grant of a closure order is premised upon the belief that defendant might be denied a fair trial by the impact on potential veniremen of widespread publicity concerning evidence whose legality and admissibility at trial have been challenged. In such a case, the right of the press and public to attend the proceeding is deemed outweighed by the defendant's right to a fair trial. However, where the court has refused to close the pretrial hearings, even though closure may have been proper, and the substance of challenged evidence is publicized to defendant's claimed prejudice, the focus of the inquiry changes. Under these circumstances, we are concerned, not with balancing the conflicting rights of the press and the defendant, but with the question of whether defendant has in fact been denied a

fair trial. Accordingly, to make out such a fair trial claim, it is incumbent upon the defendant to demonstrate more than the potential for prejudice that is sufficient to justify closure; rather, it must appear that prejudice to the defendant actually resulted from the failure to close the proceeding.

[3] In the present case, it is clear that no such prejudice has been demonstrated. As the hearing Judge noted, the details of the statements which were the subject of the suppression hearing were already known to the public. Closure of the hearing would have accomplished little in terms of attempting to shield potential veniremen from press commentary on this evidence. Moreover, it is certainly relevant at this juncture to note that the statements were not suppressed as a result of the hearing. The difficult problem that occurs when suppressed evidence is nevertheless made available to the public through the press was thus not presented in this case, because the challenged statements were deemed admissible at trial. Inasmuch as the record in this case contains no indication that defendant was in fact prejudiced by denial of her closure motion, there is no basis upon which to conclude that defendant was denied a fair trial with regard to this issue.

IV

Defendant argues that she was denied a fair trial before an impartial jury when the trial court refused to allow defense counsel to exercise a peremptory challenge to a sworn juror, or, in the alternative, to excuse that juror for cause, on the basis of information acquired after the juror was sworn. Upon the initial examination, this juror revealed that her daughter had been arrested about a year earlier in Westchester County, but that she did not know the eventual disposition of the case. The juror thought that the Grand Jury had not returned an indictment against her daughter because there was insufficient evidence. The juror was accepted by both sides and sworn. Several days later, an Assistant District Attorney who was involved in the prosecution discovered that he had handled the case referred to by the juror and that he had been instrumental in having the indictment against the juror's daughter

dismissed in the interest of justice. When the assistant prosecutor disclosed this information to the trial court, defense counsel asked that the juror be excused for cause, or that he be allowed to exercise a peremptory challenge. The trial court denied both requests.

[4] The exercise of peremptory challenges is governed by CPL 270.15. Pursuant to this statute, after each side has been given an opportunity to challenge a juror for cause, the court must permit peremptory challenges, with the People being required to exercise such challenges before the defendant. Subdivision 4 of this statute specifically states the circumstances under which a juror, once sworn, may be challenged *for cause*. Where a challenge for cause is made upon a ground not known to the challenging party before the juror was sworn, the court may allow the challenge prior to the time that the first witness is sworn at the trial. This express provision for the exercise of a challenge for cause after a juror is sworn must be taken as a legislative direction that any other type of challenge to a sworn juror is impermissible (see *People v Hughes*, 137 NY 29; *People v Carpenter*, 102 NY 238; *People v Chmarzewski*, 51 AD2d 554; *People v Mancuso*, 26 AD2d 292, mod 22 NY2d 679).[5] This interpretation of the statute is entirely consistent with the perceived need to place appropriate limitations on one of the most time-consuming aspects of criminal jury trials (Bellacosa, Supplementary Practice Commentary, McKinney's Cons Laws of NY, Book 11A, CPL 270.15, 1972-1981 Supplementary Pamphlet, p 413), while still allowing challenges to sworn jurors where good cause to excuse the juror is demonstrated.

It was nevertheless within the trial court's power, as noted, to entertain the request that the sworn juror be

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5. To the extent that *People v West* (38 AD2d 548, affd no opn 32 NY2d 944) might suggest a contrary result, it is overruled. Although the trial court in *West* appears to have allowed a peremptory challenge to a sworn juror, we note that it was argued on appeal that the juror should have been excused for cause. Our affirmance without opinion should not be interpreted as an adoption of the lower court's reasoning (see *Rogers v Decker*, 131 NY 490, 493; *Matter of Sentry Ins. Co. [Amsel]*, 36 NY2d 291, 295).

excused for cause. The defense relied upon CPL 270.20 (subd 1, par [c]) as the ground for its challenge. This objection to a juror is based upon, *inter alia*, the existence of such a relationship between the juror and counsel for the People as is likely to preclude the juror from rendering an impartial verdict. Here, defense counsel knew that the juror's daughter had been arrested in Westchester County and that although she did not know the precise disposition of the case, she knew that the result was favorable to her daughter. With this knowledge, defense counsel accepted the juror. The information acquired after the juror was sworn, which is all that may be considered in determining defendant's challenge for cause (see CPL 270.15, subd 4), was that an Assistant District Attorney involved in the present case had handled the case against the juror's daughter and had himself sought dismissal of the indictment therein. There is no indication in the record that the juror knew this Assistant District Attorney or that he knew the juror. In addition, it does not appear that the juror knew that anyone associated with the District Attorney's office, least of all this particular trial assistant, had been responsible for the dismissal of the indictment. Nor did defense counsel seek an opportunity to further explore these possibilities.

On this record, it was not error to deny the challenge for cause. Defendant has not demonstrated the existence of such a relationship between the juror and the Assistant District Attorney as rendered the juror unsuitable for service (see, e.g., *People v Provenzano*, 50 NY2d 420).

We have examined defendant's remaining allegations of error concerning prosecutorial misconduct, error in the court's charge and refusal of a discovery request. Those of defendant's objections which are preserved for our review are lacking in merit. Accordingly, defendant's conviction should be affirmed.

FUCHSBERG, J. (concurring). I am not prepared to agree that the trial of Jean Harris was error-free. But, as we and

other courts have had occasion to realistically remark in the past, "in this imperfect world, the right of a defendant to a fair appeal, or for that matter a fair trial, does not necessarily guarantee him a perfect trial or a perfect appeal" (*People v Rivera*, 39 NY2d 519, 523). In deciding whether the trial in the present case was fair, one of the rulings the majority finds acceptable gives me more than pause.

The troublesome point is the admission into evidence of the statement overheard by the police officer, even if inadvertently,[1] during the defendant's telephone consultation with the lawyer with whom she originally spoke while she was in custody on the night of the shooting. The crucial words at issue, "Oh, my God, I think I've killed Hy", were uttered after the opportunity for such communication had been arranged by the police when Mrs. Harris, in response to their query, indicated that she wished to speak to her attorney.[2] Since, in making the arrangements, the police were charged with the obligation to take reasonable precautions to ensure privacy, I cannot agree with the majority that the attorney-client privilege had not attached or that the statement the police overheard was one properly characterized as spontaneous.

Consider the charged atmosphere which prevailed at the time. It takes no imagination to sense Mrs. Harris's emo-

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1. For the reasons I discuss later, on the relevant facts, whether the overhearing was inadvertent is besides the point. In any event, close inspection of the record indicates that, though the officer, on direct, at first did testify, as the majority states, that he was backing out of the room at the time, he did not go so far as to say that he ever left the room during the conversation. Rather, on cross-examination, he admitted that he never made "any attempt of any kind to get out of earshot and give her privacy to speak with her attorney".

2. The officer who sent the overhearing officer into the room unquestionably had direct knowledge of the fact that an attorney-client consultation was about to take place, since he had actually put through the telephone call. In any event, a defendant is not to be "penalized because of any inadequacy of internal communication within the law enforcement establishment" (*People v McLaurin*, 38 NY2d 123, 126 [GABRIELLI, J.]; cf. *Santobello v New York*, 404 US 257, 259-260).

tionally distraught state. After giving the police her version of how she had come to shoot Dr. Tarnower, she had fainted upon the sight of his body being removed to the hospital. The effort to reach the lawyer sequentially followed immediately upon this episode. One officer used the telephone in the housekeeper's bedroom to do so, whereupon a second officer, having been instructed to assist Mrs. Harris into the room, noticed that she walked so unsteadily that, as he later was to testify, she "looked * * * like she couldn't make it under her own power". At the conclusion of the conversation, he found it necessary to lift her out of her chair and help her out of the room. At the suppression hearing, he candidly advised the court that, though aware that she was talking to a lawyer, he remained so closely within earshot of the conversation during its entire 3 to 5 minute duration that, at its termination, he was able to get to her side quickly enough to take the receiver from her.

It is our well-settled law that, for a statement to be dubbed "spontaneous" within the meaning of that narrow exception to the rules protective of the right to counsel, it must be one " 'made without apparent external cause, i.e., self-generating' " (*People v Lanahan*, 55 NY2d 711, 713; *People v Stoesser*, 53 NY2d 648, 650). Spelled out more sensitively, it may not have been "the result of inducement, provocation, encouragement or acquiescence" by the police (*People v Rivers*, 56 NY2d 476, 479; *People v Lanahan, supra; People v Stoesser, supra; People v Maerling*, 46 NY2d 289, 302-303).

Applied aptly in a privilege case at nisi prius, the court there put it as follows: "When [a] defendant seeks to communicate with a person and that communication would ordinarily be deemed privileged, those who hold him in custody should either (1) afford him the right to make the communication in conditions of privacy or (2) warn him that if his utterances are overheard, they may be testified to by the person overhearing them, or (3) bar all hearers from testifying to confidential communications overheard by them when conditions of privacy are not accorded and appropriate additional warnings are not given" (*People v Brown*, 82 Misc 2d 115, 120-121 [GREENFIELD, J.]).

Measured either way, it seems impossible to escape the conclusion that Mrs. Harris's admission was, at least in part, the product of "acquiescence" in, if not exploitation of, her obvious vulnerability. A lay person, presumably without sophistication in the subtleties surrounding constitutional safeguards of the right to counsel, she already had unburdened herself to the police, and hence was unlikely to be chary of doing so again (see *People v Tanner*, 30 NY2d 102, 106). On the other hand, the police, trained in such matters and cognizant of Mrs. Harris's state of mind as well as her previous willingness to talk with them, should have been well aware of the likelihood that she would make further admissions to her lawyer. In any event, they were obliged to "scrupulously honor" her right to counsel by ensuring that she could talk to her lawyer in confidence (see *People v Grant*, 45 NY2d 366, 375-376). Yet, not even the simple expedient of telling Mrs. Harris not to begin her conversation until he and the house manager's husband had left the room was essayed. I therefore *cannot see how we can fail* to agree with the Appellate Division that the admission of the "Oh, my God" statement violated the defendant's right to counsel (see *People v Grimaldi*, 52 NY2d 611, 617).

This said, it also cannot be gainsaid that the admissibility of Mrs. Harris's earlier statements to the police that she had "shot" Dr. Tarnower was not disputed. Nor can it be blinked that, on whatever weight they carried on the *issue* of intent, there was no meaningful difference between the earlier ones and the one now challenged. In the first statements, she acknowledged her act; in her last admission, she simply added her awareness of the victim's condition at that time. The difference, substitution of the word "killed" for "shot", viewed objectively, essentially reflected little more than the undisputed deterioration in Dr. Tarnower's condition between the time when she believed he had only been wounded and the time when it appeared that the wounds might be fatal.

Furthermore, the flawed statement did not bear on the vital inculpatory or exculpatory nature of the circumstances in which the shooting took place, the matter on which the outcome of this long trial, which heard 92

witnesses over a 14-week period, finally would have to turn. Indeed, neither "shot" nor "killed", in and by itself, describes a criminal act per se.

Nevertheless, defendant argues that the last statement, since it alone included the word "killed", should be considered more prejudicial than the others. This, however, is far from persuasive. For defendant's use of term "killed" was neutralized by her prefatory language, "Oh, my God, I think", which surely could be seen as evoking connotations of dismay and surprise rather than criminal intent.

But, counters the defense, the prosecutor's stress on the word "killed" rather than "shot" added to the alleged prejudice when, in the course of his summation, he discussed the statements. To this the answer is simple. That the prosecutor chose to focus his perfectly proper adversarial rhetoric on the statement overheard by the police officer rather than on the ones Mrs. Harris had volunteered previously, was, in context, of limited moment. As any good trial lawyer, or any good public speaker, will understand, had the flawed statement featuring the word "killed" not been available, he could have resorted to the earlier ones which had employed the word "shot" to make the same arguments, with the same fervor and, no doubt, to like effect.

Regretfully, therefore — because the vitality of the Bill of Rights depends, above all, on the right to counsel — I am compelled, on the record of this case taken as a whole, to conclude that the error does not justify reversal. For, against the background of the prior untainted statements Mrs. Harris already had made on her own, the erroneous admission of the one she made to the lawyer was harmless beyond a reasonable doubt (*People v Schaeffer*, 56 NY2d 448, 454). Moreover, to the extent that the violation of defendant's right to counsel also trespassed upon her attorney-client privilege, the same conclusion is warranted (see *People v Thomas*, 50 NY2d 467, 475-477 [my concurrence]; cf. *People v Glenn*, 52 NY2d 880).

In *Schaeffer*, addressing the standard for harmlessness in cases where the defendant, as did Mrs. Harris, had made admissible as well as inadmissible statements, we held

that, in accordance with elementary logic, "reviewing courts should take into account the degree to which tainted statements are duplicative of untainted ones and, to the extent they are not, the nature and the extent of the differences * * * [T]he more they differ the greater the possibility that the additional matter supplied by the tainted one was a *sine qua non* of the production of the verdict" (56 NY2d, at p 455; see, also, *People v Sanders*, 56 NY2d 51, 66-67). Here, on analysis, as I have indicated, the difference was one in form, not in fact.

I, too, therefore, must cast my vote to affirm.

Chief Judge COOKE and Judges JASEN, JONES, WACHTLER and MEYER concur with Judge GABRIELLI; Judge FUCHSBERG concurs in a separate opinion.

Order affirmed.

No. 82-1221

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

JEAN S. HARRIS,

*Petitioner,*

*against*

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Jean S. Harris,

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## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Pursuant to the Revised Rules of this Court, Rule 22, the respondent submits this brief in opposition to the captioned petition for a Writ of Certiorari.

### Preliminary Overview

Petitioner was convicted in the County Court, Westchester County, following a jury trial, of the crimes of Murder in the Second Degree, Criminal Possession of a Weapon in the Second Degree, and Criminal Possession of a Weapon in the Third Degree. She was sentenced on March 20, 1981 and May 6, 1981 to serve, respectively, an indeterminate term of imprisonment of not less than fifteen years and not more than life, an indeterminate term of imprisonment of not less than one and one-half years and not more than four and one-half years, and an indeterminate term of imprisonment of not less than one year and not more than three years, all to run concurrently.

On December 30, 1981, this judgment of conviction was affirmed unanimously by order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department. *People* v. *Harris*, 84 App. Div. 2d 63. Thereafter, on November 16, 1982, the Court of Appeals of the State of New York affirmed the order of the intermediate appellate court. *People* v. *Harris*, 57 N.Y.2d 335. The instant petition was served upon the respondent on January 20, 1983.

Petitioner concedes that her petition is "out of time," under the provisions of Rule 20.1 of this Court. She requests that her failure to comply with the appropriate time limitations be waived, noting that these requirements are not jurisdictional in nature. *Schacht* v. *United States*, 398 U.S. 58 (1970). Notwithstanding this fact, untimeliness may not be cured absent an "application for extension of time," brought in the manner prescribed by Rules 20.6, 29, 42 and 43. Indeed, this Court has considered such a motion, supported by affidavits, essential to the granting of a petition for certiorari filed *one* day out of time. Cf. *Sanabria* v. *United States*, 437 U.S. 54, 62 n.12 (1978). Moreover, Rule 20.6 states that "[s]uch applications are not favored."

Respondent notes additionally that the Court has not considered "heavy professional commitments" an acceptable reason for extending the time for the filing of a petition for certiorari, even when such a fact is set forth properly in an affidavit in support of an extension motion. *Knickerbocker Printing Corp.* v. *United States*, —— U.S. ——, 99 L. Ed. 1292 (1954); *Carter* v. *United States*, —— U.S. ——, 100 L. Ed. 1508 (1955); *Brody* v. *United States*, —— U.S. ——, 1 L. Ed. 2d 1130 (1957). Unless more compelling reasons for petitioner's admitted untimeliness can be advanced, by motion, the instant petition should be denied as "out of time".

## Facts

For six years, from 1974 until 1980, noted cardiologist Herman Tarnower tried tactfully to sever his relationship with Virgina headmistress Jean S. Harris, but petitioner Harris was unwilling to face the realities of her situation. Finally, in telephone conversations between the two on March 6, 1980 and again on the morning of March 10, Tarnower told the petitioner, in no uncertain terms, that he wanted nothing to do with her any longer.

That afternoon, March 10, 1980, the petitioner took her .32 caliber Harrington and Richardson revolver, went out onto the porch of her Virginia home, and test-fired the weapon. Then, at 5:30 P.M., she placed her gun, now fully loaded, into a car along with several extra rounds of ammunition and headed for New York.

After a trip of five hours and having weathered a heavy storm, petitioner arrived at Doctor Tarnower's home in Harrison, New York. It was 10:30 P.M. She entered through the garage, stole silently to the master bedroom, and with revolver in hand confronted the doctor in his bed. Five shots later, Herman Tarnower was dead.

## POINT I

**No statement of a criminal defendant may be excluded from evidence on constitutional grounds absent police interrogation in any form.**

Upon her arrest the petitioner, having been advised repeatedly of her *Miranda* rights and having waived these rights, was asked whether she wished to make a telephone call. In response, she requested permission to call a lawyer friend. The call was placed by police and Mrs. Harris, unsteady on her feet, was assisted to the telephone by an officer. Before he could leave the room, however, and in

the presence of the Tarnower house manager, the petitioner picked up the phone and immediately blurted out a statement, overheard by the patrolman.

In its opinion, the New York Court of Appeals stated the following:

> On the record before us, it is clear that no questioning of Mrs. Harris occurred after she invoked her right to counsel. The statement was neither induced, provoked nor encouraged by the actions of the police officers (see *People* v. *Rivers*, 56 N.Y.2d 476), who had been entirely solicitous of Mrs. Harris' request to speak with a lawyer and had scrupulously honored her rights in this regard (cf. *People* v. *Grimaldi*, 52 N.Y.2d 611). There is nothing in the record to indicate that Officer Tamilio endeavored, by subtle maneuvering or otherwise, to overhear Mrs. Harris' conversation with her attorney. Indeed, the record reflects that this officer, having assisted Mrs. Harris to the telephone, was backing out of the room when he inadvertently overheard the statement. It appears, therefore, that the officer had no opportunity to remove himself from earshot before Mrs. Harris made the damaging statement.

Petitioner's Appendix, pp. A52-A53. Petitioner does not now contest this conclusion, conceding expressly that her statement was overheard inadvertently, without interrogation by police in any form.

The decisions of this Court leave no doubt that a statement uttered by a criminal defendant prior to the commencement of formal judicial proceedings may not be excluded from evidence for violation of either the Fifth or Sixth Amendments unless it was the product of police "interrogation". *Edwards* v. *Arizona*, 451 U.S. 477, 486; *Rhode Island* v. *Innis*, 446 U.S. 291, 300. As defined in *Innis*, interrogation includes "any words or actions on the

part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.*, at 301. This Court further has held that as a normal function of arrest and custody, a police officer has the "right to remain at [an arrestee's] elbow at all times." *Washington* v. *Chrisman*, —— U.S. ——, ——, 70 L. Ed. 2d 778, 784.

There being no challenge, nor any basis to challenge, the absence of such "interrogation" in this case, Constitutional review of the admissability of this statement is unwarranted.

## POINT II

**A trial court's mere refusal to exclude press and public from petitioner's pre-trial hearings violates no constitutional right.**

As this Court twice has held, a criminal defendant has no Constitutional right to a private trial. *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 382 n.11; *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 580. Any claim to the contrary, challenging the *refusal* by a trial judge to close his courtroom to press and public during pre-trial hearings on Constitutional grounds, therefore, is frivolous.

Equally specious is petitioner's assertion that the trial court's refusal to close the courtroom to the press must be *presumed* to have deprived her of a fair trial. This Court has held repeatedly that even pervasive and concentrated pre-trial publicity which exposes jurors to extrajudicial information may not give rise to such a presumption. *Murphy* v. *Florida*, 421 U.S. 794, 799; *Nebraska Press Assoc.* v. *Stuart*, 427 U.S. 539, 565; *Dobbert* v. *Florida*, 432 U.S. 282, 303. Closure of the courtroom, moreover, only prevents the press from reporting events that transpire inside. Such reporting alone never has

amounted to the deprivation of a fair trial. Cf. *Sheppard* v. *Maxwell*, 384 U.S. 333, 362-363.

In addition, respondent would note that at each level of state proceedings in this matter, the courts below determined that petitioner, through defense counsel, was a major contributor to the publicity surrounding her trial. Petitioner's Appendix, pp. A2, A39, A57. Such a fact militates strongly against any further consideration of this issue. *Murphy* v. *Florida*, *supra*, at 796; compare *Nebraska Press Assoc.* v. *Stuart*, *supra*, at 555 n.4.

## CONCLUSION

**The petition for a Writ of Certiorari should be denied.**

Respectfully submitted,

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No. 82-1221

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

JEAN S. HARRIS,

*Petitioner,*

-vs.-

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

## PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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## PETITIONER'S REPLY TO BRIEF IN OPPOSITION

### A. The Constitutional Issues

The Respondent has not addressed the novel issues raised by Jean Harris in her Petition for Certiorari in the constitutional context of a defendant's right to speak privately with her lawyer in the place of confinement. The cases they cite deal with the separate issues of what constitutes "interrogation" (*Rhode Island v. Innis*, 446 U.S. 291, 300); a police officer's right to remain "at the elbow" of a defendant in custody (*Washington v. Chrisman*, U.S. 70 L. Ed.2d 778); and what constitutes a valid waiver of counsel (*Edwards v. Arizona*, 451 U.S. 477). If Jean Harris' inculpatory remarks had been made to a

police officer these cases might have some bearing but that is not the issue in this case. Jean Harris was talking to her lawyer after having invoked her right to counsel and the incriminatory statements made to her attorney were used against her to convict her of murder. No case decided by this Court covers that situation.

What Respondent seems to say is that a person in custody with a police officer "at her elbow" has no constitutional right to privately seek the advice of a lawyer and make confidential statements to her counsel at any point within the place of lawful confinement. If that is Respondent's position it would seem to escalate the importance of the leading question presented by this Petition. If law enforcement officers are free to overhear, either inadvertently or deliberately, statements made by a defendant to her attorney it will be an open invitation for police officers to stay "at the elbow" of defendants in custody and overhear what they say and use it against them. Under the sixth amendment, Petitioner had every right to assume, once she invoked her right to confer with her attorney, that nothing she said to him would be used against her. Thus, the State should be barred from using those confidential communications in a criminal trial against the Petitioner. For these reasons Petition for Certiorari should be granted.

### B. The Timeliness Issue

Respondent's only answer to the untimeliness of the Petition is that untimeliness may not be cured absent an "application for extension of time" brought in the manner prescribed by Rules 20.6, 29, 42 and 43. But this is not a problem in seeking an application for extension of time. And none of the rules cited by Respondent has anything to do with Petitioner's extraordinary request, which is a plea to the Court that it waive the timely filing requirements of Rule 20.1, in the interests of justice. That means justice to the Petitioner herself and the major constitutional issues presented by her murder conviction. Justice in this context is not to be dispensed or granted because of counsel's "heavy professional commitments," but because of

the necessity to correct what may be perceived as a miscarriage of constitutional justice to Jean Harris. This Court has the discretionary power to overlook an untimely filing in a criminal case whatever the reason for the untimeliness.

Insofar as the procedure followed in bringing this problem of punctuality to the Court's attention, Petitioner followed "the most appropriate way" suggested by the Clerk's Office. That procedure is described in R. Stern and E. Gressman, *Supreme Court Practice*, 395 (5th Ed., 1978):

> "The Clerk's Office suggests that the most appropriate way to handle this problem is in the body of the Petition for Certiorari, without filing a separate motion or leave to file an out-of-time petition; the matter can be discussed under the heading "Jurisdiction" or under a separate heading in the Petition such as "Timeliness of Filing."

For these various reasons, this Petition for a Writ of Certiorari to review the judgment of the New York Court of Appeals should be granted.

Respectfully submitted,

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March 10, 1983